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THE

ONTARIO REPORTS, 156

VOLUME XX.

CONTAINING

REPORTS OF CASES DECIDED IN THE QUEEN'S
BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS

EDITOR :

JAMES F. SMITH, Q. C.

REPORTERS :

QUEEN'S BENCH DIVISION.....E. B. BROWN.
CHANCERY DIVISION.....{ A. H. F. LEFROY,
GEORGE A. BOOMER,
COMMON PLEAS DIVISIONGEORGE F. HARMAN,
BARRISTERS-AT-LAW.

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MEMORANDUM.

On the 8th of May, 1890, The Honourable WILLIAM PROUDFOOT, one of the Judges of the Supreme Court of Judicature for Ontario, resigned his office.

ERRATA.

Page 131. Second line of headnote for "after" read "before."

" 180. First line of headnote for "The defendant's assignee" read
"The defendant an assignee."

" 411. Third line of headlines for "R. S. O. 1884" read "R. S. O.
1887."

REPORTS OF CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS.

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[CHANCERY DIVISION.]

RE GING.

Building societies—R. S. O. ch. 169, sec. 47—"Obligation"—Moneys deposited upon savings bank account—"Reasonable doubts"—Petition—Costs.

A person died in the United States of America having moneys to his credit deposited upon savings bank account with two building societies doing business in Ontario, incorporated under R. S. O. ch. 169. An administrator appointed by a Court in the foreign country applied to the building societies to have the moneys transferred to him, but the societies, entertaining doubts whether the words of sec. 47 of R. S. O. ch. 169, "share, bond, debenture, or obligation" applied to a savings bank account, petitioned the Court under sec. 49:—

Held, that the word "obligation" covered the liability of the petitioners to repay the amount deposited with them:—

Held, also, that the doubts of the petitioners were reasonable, and they were entitled to costs.

THE Huron and Erie Loan and Savings Company and ^{Statement.} the London Loan Company of Canada were building societies incorporated under R. S. O. ch. 169, "An Act respecting Building Societies," and both carried on business in the city of London, Ontario.

William Ging died intestate on the 2nd February, 1890, at the city of Indianapolis, in the State of Indiana, one of the United States of America, leaving standing to his credit in the savings bank department of the Huron and

Statement. Erie Loan and Savings Company \$855.75, and in the savings bank department of the London Loan Company \$2,060.65. On the 5th February, 1890, letters of administration of the personal estate and effects of the deceased were duly granted by the Marion Circuit Court of the State of Indiana, being the proper Court in that behalf, to John A. Kendall, of Indianapolis.

The administrator filed with each of the companies a duly authenticated copy of his letters of administration and a declaration in writing shewing the nature of the transmission of the interest of the deceased, as required by secs. 47 and 48 of R. S. O. ch. 169, and applied to have the two accounts transferred to his name as administrator.

The companies were ready and willing to transfer the account if they had power under the Act or otherwise legally to do so, but entertaining doubts they filed petitions in the High Court stating their doubts, pursuant to sec. 49 of the Act.*

*The sections in question read as follows :

47. If the interest of any person in any share in the capital stock, or in any bond, debenture, or obligation, of any building society or loan and savings company, such bond, debenture, or obligation not being payable to bearer, is transmitted in consequence of the death, or bankruptcy, or insolvency of such holder, or by other lawful means other than a transfer upon the books of the society, the directors shall not be bound to allow any transfer pursuant to such transmission to be entered upon the books of the society, or to recognize such transmission in any manner until a declaration in writing shewing the nature of such transmission, and also executed by the former shareholder, if living, and having power to execute the same, shall have been filed with the manager of the society and approved by the directors ; and if the declaration, purporting to be signed and executed, shall also purport to be made or acknowledged in the presence of a notary public, or of a Judge of a Court of record, or of a mayor of any city, town, or borough, or other place, or a British Consul or Vice-Consul, or other accredited representative of the British Government in any foreign country, the directors may, in the absence of direct actual notice of a contrary claim, give full credit to the declaration, and (unless the directors are not satisfied with the responsibility of the transferee) shall allow the name of the party claiming by virtue of the transmission to be entered in the books of the society.

48. If the transmission takes place by virtue of any testamentary act or instrument, or in consequence of an intestacy, the probate of the will or

The petitions set forth the above facts and stated that the petitioners entertained doubts as to the legality of the claim of Kendall (who had not obtained letters of administration in Ontario) to the savings bank accounts. The doubts of the petitioners were expressed in the petition as follows :

“ The words employed in the said section 47 of the said Act, to wit, ‘ share, bond, debenture, or obligation,’ do not in express terms apply to a savings bank account, though the

letters of administration, or testamentary, or other judicial or official document under which the title, whether beneficial or as trustee, or the administration or control of the personal estate of the deceased shall purport to be granted by any Court or authority in the Dominion of Canada, or in Great Britain or Ireland, or any other of Her Majesty’s dominions or in any foreign country, or an authenticated copy thereof or official extract therefrom, shall, together with the declaration, be produced and deposited with the manager, secretary, treasurer, or other officer named by the directors for the purpose of receiving the same, and such production and deposit shall be sufficient justification and authority to the directors for paying the amount or value of any dividend, coupon, bond, debenture, or obligation, or share, or transferring or consenting to the transfer of any bond, debenture, or obligation, or share, in pursuance of and in conformity to such probate, letters of administration, or other such document as aforesaid.

49. Whenever the directors shall entertain reasonable doubts as to the legality of any claim to or upon such share or shares, bonds, debentures, obligations, dividends, coupons, or the proceeds thereof, then and in such case it shall be lawful for the society to file in the High Court, a petition stating such doubts, and praying for an order or judgment adjudicating and awarding the said shares, bonds, debentures, obligations, dividends, coupons, or proceeds to the party or parties legally entitled to the same, and such Court shall have authority to restrain any action, or proceedings against the society, the directors or officers thereof, for the same subject matter, pending the determination of the petition ; and the society, and the directors and officers thereof, shall be fully protected and indemnified by obedience to such order or judgment against all actions, claims and demands in respect of the matters which shall have been in question in such petition, and the proceedings thereupon ; provided always, that if the Court adjudges that such doubts were reasonable the costs, charges, and expenses of the society in and about such petition and proceedings, shall form a lien upon such shares, bonds, debentures or obligations, dividends, coupons or proceeds, and shall be paid to the society before the society shall be obliged to transfer or assent to the transfer, or to pay such shares, bonds, debentures or obligations, dividends, coupons or proceeds to the party or parties found entitled thereto.

Statement. word "obligation" might be wide enough to cover such a claim, and the general spirit of the Act would seem to be in favour of the power of the company to transfer such an account under the sections in question."

The petitions also stated that :

"Your petitioners' doubts upon the matter are *bond fide*, and they believe them to be reasonable, and they are unwilling to assume the responsibility of allowing the said transfer without first obtaining the opinion of this Honourable Court and an order protecting them in such action as they may be directed to take in the matter.

"This application is made with the consent and concurrence of the said John A. Kendall."

The prayers of the petitions were for orders under sec. 49, adjudicating and awarding the savings bank accounts or the proceeds thereof to the party or parties legally entitled, and declaring who such parties were, and for the costs of the petitions.

The petitions were brought before ROBERTSON, J., in Court on the 26th June, 1890.

Gibbons, Q.C., for the petitioners.

August 11, 1890. ROBERTSON, J. :—(after stating the facts.)—

Neither of the petitioners shews whether there are any other claimants for the said funds ; but I presume it may be assumed that there are not.

It appears by sec. 55 of the Act in question that these societies may, if by their rules, regulations, and by-laws so authorized, borrow from any person or persons any sum not greater than the amount of its capital actually paid in on unadvanced shares, or on fixed and permanent capital, &c.; and the paid in and subscribed capital "shall be liable for the amount so borrowed, received, or taken by the society;" and one of the by-laws of these societies is in these words :

"POWER TO BORROW OR RECEIVE MONEY ON DEPOSIT. Judgment.

10. The directors are authorized to borrow money for **Robertson, J.** the use and on the assets of the company ; to receive money on deposit in large or small sums, and to pay such interest therefor, and under such regulations, as they may from time to time deem advisable ; and to issue and dispose of the debentures of the company."

Now, as to the word "obligation," it means in my opinion here that which constitutes legal duty, and which renders one liable to coercion for neglecting it—an act which binds a person to some performance. Here these societies have by their by-laws authorized the directors to receive money on deposit as a savings bank from the public at a rate of interest therefor and under such regulations as they from time to time may deem advisable. This being the case, and the directors having received the money now standing to the credit of the deceased in their books, an "obligation" was created thereby to repay the amount whenever called for, with the interest.

I think, therefore, it should be declared that the said John A. Kendall, as administrator of the estate of the said William Ging, deceased, is entitled to have the several amounts which stand to the credit of the deceased in the books of the said several societies transferred to his account; and that he is the party legally entitled to receive the several amounts thereof. And I adjudge that the doubts entertained by the petitioners were reasonable ; and I order that the costs, charges, and expenses of the said several societies in and about these petitions and proceedings shall form a lien upon such amounts and shall be paid to each society before they or either of them shall be obliged to make such transfer or assent thereto or to pay the amounts to the credit of the said deceased to the said John A. Kendall, as such administrator as aforesaid.

G. A. B.

[CHANCERY DIVISION.]

BAIN V. ÆTNA LIFE INSURANCE COMPANY.

Insurance—Life—Endowment participating plan—Right of insured to profits—Divisible surplus—Discretion of actuary and directors—Statements of company in letters and pamphlets.

The plaintiff insured with the defendants upon their "endowment participating plan," and by the contract of insurance the defendants agreed to pay him at the end of a specified period, if he survived, a certain sum, together with his share of the profits made in that branch of the business during the period.

The plaintiff, being dissatisfied with the share allotted to him, claimed an account and payment of his share of all the profits. The defendants claimed the right to hold a portion of their apparent surplus to ensure the future stability of the company:—

Held, that the plaintiff was bound to acquiesce in the discretion of the actuary and directors of the company, *bonâ fide* exercised, and to take his share of what was apportioned as divisible surplus; and that being so, that his case was not advanced by statements made by officers of the company in letters or pamphlets as to the course pursued by them in dividing the surplus.

Statement.

THE plaintiff by his statement of claim alleged that in July, 1868, the defendants issued to him their policy of insurance, upon what was known as their "endowment participating plan" under and by virtue of which the defendants, in consideration of certain payments to be made by the plaintiff, agreed with the plaintiff that, if he should survive the period of twenty-one years from the date of the said policy, they would pay to the plaintiff the sum of \$3,000, together with his full share of all the profits made by the said company in that branch of its business during the said period. The plaintiff alleged payment of all sums to be paid by him, and performance of conditions precedent, and default in payment by the company. And he alleged that the company had made large profits in its said business during that period, and had not accounted to the plaintiff for his share thereof. The plaintiff further charged that in 1876 he complained to the general agent of the defendants at Toronto, that amongst other things the defendants were not accounting for and dividing the profits of their business in the said

branch ; and the said complaint was stated and represented Statement.
to the defendants, and the defendants by their then president, by writing dated the 2nd November, 1876, admitted that the profits had not been accounted for and divided, and declared that there were "surplus profits" to be accounted for and divided, and that such surplus profits had been invested, and that the defendants would pay to the plaintiff his proportion thereof when the policy matured and became payable; and the plaintiff alleged that he relied on the statements and promises contained in said writing; and on the faith thereof, he continued to pay and had paid the annual premiums maturing since the said date which were demanded by the defendants.

The plaintiff claimed a declaration that he was entitled to \$3,000 and interest and the said profits and judgment therefor; and that all necessary accounts be taken and inquiries made.

The defendants by their statement of defence admitted that under their policy there was due \$2,538, being the amount due after deduction of a certain promissory note of the plaintiff, and they pleaded tender and paid the money into Court, and they denied all other liability to the plaintiff.

Issue was joined thereon.

The action was tried before FALCONBRIDGE, J., without a jury, at the Toronto Assizes, on the 7th, 8th, and 18th November, 1889.

The plaintiff's policy did not provide definitely as to payment of profits; but it was stated upon the face of it that it was an "endowment participating policy."

The writing of the 2nd November, 1876, referred to in the statement of claim was put in. It was a letter from the then president of the defendants in answer to a letter of the Toronto agent of the defendants in reference to complaints made by the plaintiff, and contained a request that it should be shewn to the plaintiff.

Statement.

The following are the material parts of the letter:—

“The withholding of surplus in the manner we have, which was thought to be the true policy by the directors and officers of the company, works no special disadvantage to the policy holder in the long run, because that surplus bears interest, and he will get his proportion of it, as at the settlement of the policy it is the practice of the company, as you very well know, to return to the policy holder any portion of the surplus that may have been withheld that properly belongs to him. * * The profits of this company, with the exception of six per cent. on its capital stock, or \$9,000 per year on business done in the mutual or participating department, are paid to policy holders, or, if not wholly so paid, are used to increase the surplus of the company, thus strengthening it so as to make the payment of its policies absolute, beyond any peradventure, and if the money forming this surplus is not necessary to provide for extraordinary losses or depreciation of values occasioned by panics and financial disturbances, he will certainly get his proportion of it at the settlement of the policy. and perhaps sooner. It is not impossible that the surplus of this company on the 1st of January next will be deemed sufficient by the directors to provide against all such contingencies, and that their policy henceforth may be to divide what surplus is earned from year to year * * While some portion of the earnings which it has been the practice of other companies to pay out from year to year in dividends have been retained, thus increasing the surplus of the company, we think we have shewn that only a temporary disadvantage can be occasioned to policy-holders by such action.”

The plaintiff also relied upon certain statements in pamphlets issued by the defendants.

The case was argued on November 18th, 1889.

Laidlaw, Q. C., for the plaintiff. The only question for decision is whether the plaintiff is bound to submit to the discretion of the actuary and directors, or whether he is

entitled to a share of all the profits. The defendants say ^{Argument.} that they are entitled to retain a portion of the profits to secure the future stability of their undertaking. No power is reserved to the directors to withhold any part of the profits. The plaintiff depends upon his contract, confirmed by the letter of the president. The defendants have no right to take what belongs to the plaintiff to assure the future stability of their company, and to say "we shall run no risks whatever." The profits, in the language of the president, should be paid to the plaintiff "at the settlement of his policy." I refer to *Re Albion Life Assurance Society*, 16 Ch. D. 83; *Last v. London Assurance Corporation*, 10 App. Cas. 438; *Stringer's Case*, L. R. 4 Ch. 475; *Lambert v. Neuchatel Co.*, W. N. 1882, p. 128. The plaintiff does not charge fraud; he only claims to have the contract carried out.

S. H. Blake, Q.C., for the defendants. In no case either in England or the United States has such a claim as this been allowed. If allowed, it would lead to this position, that every policy holder would become a co-manager of the company—a position which even a stock-holder does not occupy. As there are some sixty thousand policy holders in this company, the *argumentum ab inconvenienti* is very strong. Where a divisible surplus has been set apart, it must be equitably divided, and this is the whole length to which the cases have gone. The right of the plaintiff is to participate in what the board of directors say he shall participate in. The participators are not to control. Who is to be the judge of the amount to be distributed? The plaintiff must take from time to time the share assigned to him by those honestly working out the problem, what is the divisible surplus. In the absence of fraud there is no right to set aside the conclusions of the board of directors. A simple letter from the president cannot alter the policy of the company, the sealed contract between them and the plaintiff; indeed, the letter only holds out probabilities, and does not in any way vary the contract. It is not within the province of the Court

Argument. to say whether what the company have done is reasonable or unreasonable. I refer to *Re English and Irish Church and University Assurance Society*, 1 H. & M. 85, 105; *Manby v. Gresham Life Ins. Co.*, 7 Jur. N. S. 383; *Fuller v. Knapp*, 24 Fed. Rep. 100; Porter on Insurance, 2nd ed., pp. 388, 389, 390, 392, 395; *Scott v. Eagle Ins. Co.*, 7 Paige, (N. Y. Ch.) 203; *New York Life Ins. Co. v. Styles*, 61 L. T. N. S. 201, 206; (distinguishing *Last v. London Assurance Corporation*, 10 App. Cas. 438); Scratchley on Assurance, 13th ed., p. 36; Alexander on Insurance, pp. 27, 28, 32; *Haight v. Day*, 1 Johns. Ch. (N. Y.) 18; *Fisher v. Charter Oak Life Ins. Co.*, 14 Abbott, N. C., (N. Y.) 32, 37; *Luling v. Atlantic Mutual Ins. Co.*, 45 Barb. (N. Y.) 510; Article in 26 Sol. J. 294.

J. J. Maclaren, Q.C., on the same side, referred to *Uhlman v. New York Life Ins. Co.*, 109 N. Y. 421; *S. C.*, 38 Albany L. J. 114; *Cohen v. New York Mutual Life Ins. Co.*, 50 N. Y. 610; *People v. Security Life Ins. Co.*, 78 N. Y. 114.

Laidlaw, in reply. The only argument of the defendants is that *ab inconvenienti*, with which the plaintiff is not concerned. An account can be taken between him and the defendants. There is no stipulation in this contract that the plaintiff shall be bound by accounts as stated by the defendants. In *Re English and Irish Church and University Assurance Society* 1 H. & M. 85, there was an express provision of this kind. In the pamphlet published by the defendants in 1864 it was represented that policy-holders would share in the entire profits over and above expenses, dividends, &c.

[*Maclaren*.—That was not the pamphlet upon which the plaintiff was canvassed].

August 19, 1890. FALCONBRIDGE, J.:—

The facts as to the defendants' mode of dealing with the surplus and profits are not in dispute, and are to be gathered from the evidence of the defendants' secretary given orally

at the trial, and from his evidence and that of the company's actuary taken under commission.

Judgment.
Falconbridge,
J.

The plaintiff claims to be entitled to his share of all the profits accruing from year to year.

Defendants admit that these have not been all divided since 1871, but claim the right to apply, or at any rate hold, a portion of their technical or apparent surplus to ensure the future stability of the company. The actuary draws up a plan of dividend and submits it to the directors for approval.

In life insurance the liabilities are not, as in ordinary business, capable of being definitely ascertained. The amount which may be necessary to *implement* the company's engagements, can be only estimated—estimated it may be, with considerable accuracy, having regard to the doctrine of chances and the accumulated experience of a century or so—but still only determined on a theoretical and scientific basis. It would not be unreasonable that the company should be permitted to allow a margin, if their contract with the plaintiff permits them to do so.

The question for decision here is whether the plaintiff is bound to submit to the discretion of the actuary and directors in this regard, or whether he is entitled to all the profits, and therefore to an account.

Fraud is not charged in the pleadings, and all charges of fraud were distinctly disavowed in the argument.

Fraud being excluded, the question is as to the right of a participating policy holder to interfere with the action of the directors and to call for an account.

I have found no case where such a claim as this has been allowed in England or the United States.

Where dividends "have been ascertained and appropriated to the class of bonus policy holders, they become a trust fund, and a bill might be filed to secure the fund, if there were danger of its being wasted; but, until the trust is impressed upon it, the assured have not the slightest control over the affairs of the company, nor any right to interfere in the proceedings for ascertaining the amount of the

Judgment. divisible profits:" per Sir W. Page Wood, V. C., in *Re Falconbridge, J. English and Irish Church and University Assurance Society*, 1 H. & M. at p. 107.

In *Manby v. Gresham Life Ins. Co.*, 7 Jur. N. S. 383, the Court, Sir J. Romilly, M.R., held it to be impossible to interfere with the judgment of the directors *bond fide* exercised.

The American decisions are still more pointed. "A dividend is a sum actually apportioned. The parties to a contract of life insurance do not contemplate that the policy holder is to be permitted to participate in the management of the company, or dictate the amount of the dividend it shall declare, or question the result after the discretion of its managers has been exercised in this behalf. The contract is that the policy holder shall have the benefit of such dividends as are appropriated, not such as the policy holder or a Court may think might have been discreetly appropriated by the company:" *Fuller v. Knapp*, 24 Fed. Rep. at p. 105.

The inconvenience, in fact the absolute impossibility, of permitting its 50,000 policy holders to become co-managers of this company's affairs, needs no demonstration.

Mr. Alexander says (Notes on New York Law of Life Ins., 1887, at p. 27): "These rules are for the protection of the insured. Otherwise, each dissatisfied policy holder might file a bill to enforce his peculiar views, and the company would be submerged in litigations."

Re Albion Life Assurance Society, 16 Ch. D. 83, relied on by the plaintiff, so far as it is in point, is a case of a mutual insurance company, and the participating policy holders were made members of the company. See *New York Life Assurance Co. v. Styles*, 61 L. T. N. S. 201, distinguishing *Last v. London Assurance Co.*, 10 App. Cas. 438, cited by the plaintiff, and holding that the surplus there did not constitute profits or gains liable to be assessed to the income tax.

If I am correct in coming to the conclusion, as I do, that the plaintiff is bound to acquiesce in the discretion of the

actuary and directors *bond fide* exercised, and to take his share of what is allotted or apportioned as divisible surplus, his case is not advanced by the statements in the pamphlets, nor by the president's letter of 2nd November, 1876. Judgment.
Falconbridge
J.

I think the action must be dismissed with costs.

G. A. B.

[CHANCERY DIVISION.]

HALL ET AL. V. HOGG ET AL.

Lien—Mechanics' lien—Material men—Time for registering claim—R.S.O. ch. 126, sec. 21.

Merchants supplied materials to the contractor for certain buildings and claimed a lien under the Mechanics' Lien Act in respect thereof. There was no contract for the placing of these materials upon the property; the last of them were bought by the contractor from the merchants on the 22nd November, and were by him placed in the building on the 23rd November:—

Held, that the time for registering the claim of lien, under sec. 21 of the Act, R. S. O. ch. 126, began to run from the 22nd November.

AN action under the "Mechanics' Lien Act."

Statement.

The facts of the case, so far as they relate to the point decided by the judgment printed below, were as follows:

The defendant Frederick Hogg contracted, under the usual form of builder's contract, with the defendant William Radcliff, the owner, to do the carpenter's work of a block of houses in Blong street, in the city of Toronto, for the price of \$3,211.35. Messrs. Frost and Picken, (who were represented in the action by Peleg Howland, their assignee in insolvency) were hardware merchants, and supplied hardware to the contractor Hogg from time to time as ordered, which hardware went into these buildings. On the 30th November, 1889, after the buildings were completed, Frost and Picken rendered to the contractor their account, the last item of which was four

Statement.

door locks, which were charged as of the 22nd November, 1889. On the 23rd December, 1889, Frost and Picken registered a claim for a lien against these houses for the amount of their said account, being \$188, and the affidavit of Mr. Frost verifying their claim stated that the last of the materials supplied by Frost and Picken for these buildings were supplied on or before the 25th November, 1889, and in the copy of the account annexed to the affidavit the last item, the four locks, appeared as of the 25th November, and not as of the 22nd November, as in the account previously rendered.

The plaintiffs, who were lien-holders, and who also claimed the balance in the owner's hands under an equitable assignment, brought this action to establish their claims and to displace the registered lien of Frost and Picken.

On a reference to the Master in Ordinary, the account rendered by Frost and Picken to the contractor, shewing the sale of the locks as of the 22nd November, was put in evidence; the contractor deposed that he himself got the locks from Frost and Picken's store, but he could not fix the date; the carpenter who put the locks in the doors deposed that he got them from the contractor on the morning of the 23rd of November, and put them in the doors the same day. No satisfactory evidence to displace these facts or to explain the discrepancy between the account rendered, and that filed with the claim for a lien, was given on behalf of Frost and Picken.

The Master in his report, allowed the claim of Frost and Picken, and from that report the plaintiffs appealed.

The appeal was argued before BOYD, C., in Court, on the 24th September, 1890.

J. A. Macdonald, for the plaintiffs, contended that the only evidence before the Court of the date of the sale and delivery of the last of the materials, viz., the four locks, was that furnished by the account of the 30th November; and that the thirty days within which a lien might be

registered under the Act, were to be computed from the ^{Argument.} date mentioned in that account, and not from the date of their actual incorporation in the buildings; citing *Re Moorehouse and Leak*, 13 O. R. 290.

Bain, Q. C., for the defendant Howland, contra.

[It was also argued that the equitable assignment to the plaintiffs of the amount due by the owner to the contractor, was equivalent to payment, and having been made after the expiration of ten days from the completion of the work, without notice of the lien or charge of Frost and Picken, effectually deprived them of their lien.]

September 27, 1890. BOYD, C.:—

Contrary to the opinion which I held during argument, I now am of opinion that the lien of Frost and Picken was registered a day too late. The Master finds that the last articles supplied by these material-men to the contractor were brought upon the premises subject to the lien on the morning of the 23rd November, and were placed in the building that same day. That, however, is not the critical test of time, as I read the Act. The last goods supplied by these merchants were four locks, which by the account rendered were sold and charged for as on the 22nd November, and there is no evidence to displace the accuracy of this date. Apparently they were bought by Hogg the contractor in person, and were by him brought to the premises in question. There was no contract for the placing of these materials on the property by the claimants; all that they had to do in the transaction of furnishing or supplying was ended with the sale and delivery of the goods in the usual course of business; and the time for registering a lien runs as to them from the day of that sale and delivery. The Lien Act uses in various parts different words as to materials, such as "supply," "furnish," "deliver," all meaning much the same thing, *i. e.*, the providing what is wanted (in or for the construction

Judgment. of the building). Section 4 says that a person furnishing materials to be used, &c., shall, by virtue of so furnishing, have a lien, &c.; and by section 21, (as applicable to the contract) the lien may be registered within thirty days from the supplying of the materials. The materials being supplied on the 22nd November, time began to run next day, and the thirty days expired on the 22nd December.

Boyd, C.

On this ground I allow the appeal, and declare that Frost and Picken are not lien-holders.

Costs to follow the result.

G. A. B.

[QUEEN'S BENCH DIVISION.]

RE MITCHELL V. SCRIBNER.

*Prohibition—Division Court—Order of Judge setting aside attachment—
R. S. O. ch. 51, sec. 262.*

Power over the process of his own Court is inherent in the Judge of a Division Court as well as of other Courts; and, notwithstanding the provisions of sec. 262 of the Division Courts Act, R. S. O. ch. 51, a Judge may set aside an attachment which has been improperly issued.

THIS was an application by the plaintiff for a prohibi-^{Statement}tion to the Junior Judge of the County of Kent, and the defendant and his solicitor, forbidding them to act upon an order made in an action in the 2nd Division Court of Kent, by the Junior Judge, setting aside an attachment which had been issued in the action.

The grounds of the application were that the Judge had no authority to set this or any other attachment aside, and that if he had such authority he had in the present case exercised it upon insufficient grounds.

The motion was argued before STREET, J., in Chambers, on the 26th August, 1890.

Douglas Armour, for the plaintiff, referred to *Clarke v. Macdonald*, 4 O. R. 310; *Jackson v. Randall*, 24 C. P. 87; *Re Pacquette*, 11 P.R. 463, and argued that the remedies of a defendant against whom an attachment has been improperly issued and the powers of a Judge of the Court out of which it issued are all limited to the refusal to the plaintiff of costs, by sec. 262 of the Division Courts Act, R. S. O. ch. 51, which is as follows: " Subject to the provisions contained in sections 14 and 16 of the Act respecting Absconding Debtors, in order to proceed in the recovery of any debt due by the person against whose property an attachment issues, where process has not been previously served, the same may be served either personally or by leaving a copy at the last place of abode, trade or dealing of the defendant, with any person there dwelling, or by leaving the

Argument. same at the dwelling, if no person be here found; and in every case, all subsequent proceedings shall be conducted according to the usual course of practice in the Division Courts; and if it appears to the satisfaction of the Judge on the trial, upon affidavit, or other sufficient proof, that the creditor who sued out an attachment had not reasonable or probable cause for taking the proceedings, the Judge shall order that no costs be allowed to the creditor or plaintiff, and no costs in such case shall be recovered in the cause."

Swabey, for the defendant, contra.

August 29, 1890. STREET, J. :—

The provision of the Act relied upon does not purport to interfere with any power which the Judge may have before the trial over the process of his own Court.

I think it is clear that such a power must be taken to be inherent in the Judge of a Division Court as well as of other Courts, in order to prevent the abuse which must arise if no power existed to stay proceedings and if necessary set them aside where process of this kind has been improperly issued.

I am of opinion, therefore, that the Judge had authority to make this order; I cannot hear an appeal from his decision upon the merits, and it is therefore unnecessary for me to go into them.

The motion should be dismissed with costs.

[CHANCERY DIVISION.]

ATTORNEY-GENERAL FOR CANADA V. CITY OF TORONTO.

Municipal corporations—By-law as to payment of water rates—Discount to consumers—Exception as to government institutions—Taxes—Discrimination.

A by-law of the defendants relating to the payment of rates for water supplied by the defendants to buildings in the municipality, provided that the rates should be subject to a reduction of fifty per cent. if paid within a certain time, "save and except in the cases of government and other institutions which are exempt from city taxes, in which cases the said provisions as to discount shall not apply :"—

Held, that the post-office, customs-house, and other buildings vested in the Crown, all of which were exempt from city taxes, were "government institutions," within the meaning of the by-law.

2. Having regard to 35 Vic. ch. 79, sec. 12, (O.) ; 41 Vic. ch. 41, sec. 3, (O.) ; R. S. O. ch. 192, secs. 19 and 28, that the moneys charged and paid as water rates or rent for water were not taxes, but the price or prices paid for water upon a sale thereof to the consumers.
3. That the by-law was not invalid as discriminating against the Crown.

THIS was an action brought by the Attorney-General for Statement.
the Dominion of Canada, for and on behalf of Her Majesty the Queen, against the corporation of the city of Toronto, to recover moneys alleged to have been overpaid to the defendants for water supplied to certain buildings in the city of Toronto vested in the Crown as represented by the government of the Dominion of Canada.

By by-law No. 1,998 of the city of Toronto, passed on the 23rd April, 1888, the former by-law relating to the payment of water rates was amended so as to read: "All such half-yearly rates paid within the first two months of the half year for which they are due shall be subject to a reduction of 50 per cent., *save and except in the cases of government or other institutions which are exempt from city taxes, in which cases the said provisions as to discount shall not apply.*"

The plaintiff claimed that the buildings in question did not come within the meaning of the words of the by-law as being "exempt from city taxes;" but if they did that the by-law, in so far as it affected the Crown, was *ultra vires* of the defendants, and in so far as it sought to exclude

Statement. the Crown from the right to a reduction or rebate, was invalid; and asked to have an account taken on the footing of the allowance of the rebate, and the amount overpaid, repaid.

The pleadings are stated in the judgment.

The action was heard upon motion for judgment on the pleadings before FERGUSON, J., in Court, on the 25th June, 1890.

James Reeve, Q. C., for the plaintiff. By-law 1,998 provides for a reduction of one-half if payment is made at periods specified. This contains an exception against the plaintiff and others who do not pay and are exempt from paying city taxes. These exceptions are the subject of attack. If they are not good, the plaintiff is entitled to recover back the moneys paid. The by-law may be questioned in this action without being quashed: *Jarvis v. Kingston*, 26 C. P. 526; *Reg. v. Osler*, 32 U. C. R. 324; *Black v. White*, 18 U. C. R. 362; Harrison's Municipal Manual, 5th ed., p. 243. "Institutions exempt from city taxes" would not include government institutions because the reading would be in favour of the Crown. The exemption from taxes is a prerogative, and it cannot be a factor in the reason for denying a benefit to the Crown. The Crown not paying taxes and the citizen paying taxes are in the same situation, and the exceptions are a discrimination against the Crown. The power to make the abatement on pre-payment is general and co-extensive with the rate or charge fixed: R. S. O. ch. 192, secs. 19, 20. The rates or rents must be fixed generally, and the abatement for pre-payment must be general also. If the municipality infringe upon any principles of common law or statute law or any other recognized power, they must be able to shew authority so to do expressly given: Harrison's Municipal Manual, 4th ed. pp. 213, 214. The Crown is not affected if not named: Maxwell on Statutes, 2nd ed., p. 161. Can the city say to the Crown, you enjoy a prerogative right,

and for this reason we will impose burdens upon you? It ^{Argument.} is doubtful whether there is the right to collect any water rates from the Crown. This rate is, in all respects, a tax, and the Crown is not subject to it, but the plaintiff only asks to be allowed the rebate. Sub-sec. 2 of sec. 19 of R. S. O. ch. 192 shews clearly that it is a tax. An essential of taxation is equality: Hilliard on Taxation, pp 23-5.

Wickham, on the same side. Exemption from taxation is not one of the elements on which any estimate or rebate is based. The Crown is not liable to such rates: *Attorney-General v. Donaldson*, 10 M. & W. 117.

C. R. W. Biggar, Q.C., for the defendants. Under 35 Vic. ch. 79 (O.), the defendants purchased the water works from one Furniss. The purchase money was raised on debentures to be paid by the tax-payers, and in consideration of this a benefit is offered them on condition of prompt payment. By 41 Vic. ch. 41 the power of the commissioners is vested in the corporation of the city. The people supplied with the water simply come to the city and purchase at a cheap rate. See 35 Vic. ch. 79, sec. 3 (O.). The defendants are not acting as a municipal corporation; they are simply clothed with the power of the commissioners arising upon the purchase of the Furniss works. The principle of taxation does not apply at all. A by-law must not discriminate; but what is complained of here is entirely different from what is meant by discrimination. It merely fixes the price of a thing to be sold. In any case it is not a burden imposed but a benefit refused. The Crown not being bound by the statute makes no difference, for this is a mere sale of a commodity. Sec. 19 of the Municipal Waterworks Act, R. S. O. ch. 192, entirely justifies the by-law.

Reeve, in reply. The commissioners were agents of the corporation, and their acts were the acts of the corporation. The corporation have been acting from the beginning. The rate is a tax, and not a price paid for a commodity.

Judgment. September 4, 1890. FERGUSON, J.:—

Ferguson, J.

The case came before me on the 25th June last by way of motion for judgment on the pleadings. The defence does not seem to admit the whole of the allegations in the plaintiff's pleading; but there was really no dispute as to the facts of the case.

The plaintiff states that certain buildings in the city of Toronto, describing them as the customs house and customs warehouse, on Yonge street; the post-office, on Lombard street; the post-office, on Adelaide street east; and the inland revenue and receiver-general's office, on Toronto street, and the premises on which the same are respectively built, are vested in the Crown, as represented by the Dominion of Canada.

That for about eighteen years prior to this action the officers of the Dominion government of the various departments occupying these buildings have had the user of the water supplied by the water works department of the defendants' corporation to these buildings.

The plaintiff then refers in general terms to the Act of the Legislature under the provisions of which the water commissioners were elected and constituted a corporation aggregate, with full power and authority, amongst other things, to regulate the distribution and use of the water in all places and for all purposes where the same might be required, and from time to time to fix the prices for the use thereof, and the terms of payment; and also from time to time to fix the price, rate, or rent which any owner or occupant of any house, tenement, lot or part of lot, or both, on, through, or past which the water pipes should run, should pay as water rate or rent, whether such owner or occupant should use the water or not, having due regard to the assessment, and to any special benefit and advantage derived by such owner or occupant or conferred upon him or her or their property by the water works and the locality in which the same might be situated, and referring also to the provisions whereby the water rates, &c., are made a lien upon the properties benefited.

Reference is then made to the power of the commis- sioners to fix the rate or rent to be paid for the use of the water by hydrants, fire plugs, and public buildings, and to ch. 39 of 40 Vic. (O.), whereby the commissioners were empowered to place meters on buildings and to fix the price to be paid for the use of any such meters, and to the Act 41 Vic. ch. 41 (O.), whereby the powers of these water commissioners were vested in the corporation of the city of Toronto.

Judgment.
Ferguson, J.

The plaintiff then states that the defendants then proceeded to pass by-laws for the regulation of the water works, and passed, amongst others, by-law No. 886, whereby it was enacted that all rates paid within the first month of the quarter for which they are due shall be subject to a reduction of thirty-three and one-third per cent.; and that by by-law No. 1,998, clause 5 of that by-law was amended so as to read as follows: "All such half-yearly rates paid within the first two months of the half year for which they shall be due, shall be subject to a reduction of 50 per cent., save and except in the cases of government or other institutions which are exempt from city taxes, in which cases the said provisions as to discount shall not apply."

It is then stated that the proper officer of the Dominion government paid all arrears to the 30th September, 1888, and all arrears in respect of the customs house up to the 31st of March, 1889, and that between the 30th day of January, 1889, and the 25th day of October, 1889, tenders were made, at the proper times and places, necessary to entitle the plaintiff to the rebate of 50 per cent. of the amount charged and assessed to the said buildings; but the tenders were refused, the proper officer of the defendants declining to receive the amounts so tendered, on the ground that the plaintiff was not entitled to any rebate in respect of the said buildings under the provisions of the by-laws aforesaid. Certain payments under protest are then alleged and the amounts and particulars thereof specified.

The plaintiff claims that these buildings do not come within the meaning of the words of the by-law as being 'exempt from city taxes;' (2) that if the buildings do

Judgment. come within the meaning of these words, the by-law, in so far as it affects the Crown, is *ultra vires* of the corporation of the city of Toronto, and, so far as it seeks to exclude the Crown from the right to such reduction, is invalid; and a reference is asked to ascertain the amount of rebate to which the plaintiff is entitled, and that the same may be ordered to be paid, together with the costs of the action.

Ferguson, J.

The defendants by their statement of defence, after making certain comprehensive admissions, say that, under the powers conferred upon them by the statutes in that behalf made and provided, they had and have full power to fix the rate or rent to be paid for the use of the water supplied by means of their works and mains to the public buildings in the statement of claim mentioned, and for the rent of the meters supplied by them for the purpose of ascertaining the quantity of water so supplied.

In argument it was said by plaintiff's counsel that the exceptions contained in the by-law were the subject of attack, and that if they are not good and valid the plaintiff is entitled to recover back the 50 per cent. that should have been allowed by way of discount or rebate.

As to whether or not the properties mentioned in the statement of claim are embraced within the meaning of the words in the by-law, "*save and except in the case of government or other institutions which are exempt from city taxes,*" I do not see that there is much (if any) room for doubt.

A definition or meaning of the word "institution" is 'establishment,' and a meaning of "establishment," is "a place of residence or business." See Nuttall's Standard Dictionary. The properties in question are, as I understand, places of business. They are the property of the Dominion government, the plaintiffs. I think it may fairly be said that they are government institutions; and, besides, one should not be too particular as to the use of words when what was intended is plain, and there is any meaning of the words employed that is applicable. Then it is undisputed that the properties are by law exempt from city

taxes, and I see no reason for saying they are not embraced within the meaning of the words of the exception in the by-law. Judgment.
Ferguson, J.

Then as to the by-law being, so far as it affects the plaintiff, *ultra vires* or invalid, the chief arguments for the plaintiff were based upon the assertion that the charges made for water are taxes, and as such cannot be collected from the Crown, and that being taxes the assessments for them must be made equally.

By the 12th sec. of 35 Vic. ch. 79(O.), power and authority are given to the commissioners to fix the *price, rate, or rent*, to be paid as *water rate* or *rent*.

By the 3rd sec. of ch. 41 of 41 Vic.(O.), it was enacted that the corporation of the city of Toronto should, from and after the passing of the Act, have, hold, use, exercise, and enjoy all the powers and duties, rights and privileges had, held, used, enjoyed, and exercised by the commissioners, &c.

By sec. 19 of the Municipal Water Works Act, 1882, it is enacted that the corporation shall regulate the distribution and use of the water in all places and for all purposes where the same may be required, and from time to time shall fix the *prices* for the use thereof, and the times of payments; and the same words are employed in sec. 19 of the consolidated Act, ch. 192 R. S. O., 1887.

By the 28th section of the Act power is given to "supply" upon special terms any corporation or person with water although not resident within the municipality.

There are other enactments in which the words *price* and *prices* are used in respect of the supply of the water. These words (or one of them) seem to be the prominent words used by the Legislature in this respect, although the words "rate," "rent," and "assess" are used.

The word "price" is defined as being "the sum for which anything may be bought, or at which its value is rated; an equivalent in money asked for anything; cost." (See Worcester's Dictionary.) The word "rate" does not necessarily apply to taxes, nor do either of the words "rent"

Judgment. or "assess." So far as I am aware, the word "rent" does
Ferguson, J. not so apply at all.

The general definition of "taxes," given in Cooley on Taxation is "The enforced proportional contribution from persons and property levied by the state, by virtue of its sovereignty, for the support of the government and for all public needs." The same author says, "Taxes are supposed to be regular and orderly, and they are commonly required to be paid at regular periods." I find other definitions of the word "taxes" agreeing with the one above given.

There are, of course, various kinds of taxes, local and otherwise, which I find discussed or treated of in the books at some length; but, in the view that I take in this case, I do not see that it is at all necessary that I should further pursue the subject here.

I have arrived at the conclusion that the moneys charged and paid as water rates, or rent for water, in the city of Toronto, are not taxes at all; that they are the price or prices paid for the water upon a sale thereof to the respective consumers by the corporation of the city, and that the contentions founded upon the proposition that taxes cannot be collected from the Crown cannot prevail, because the proposition does not apply to the case. I should, I think, state here that counsel for the plaintiff, although contending that the plaintiff could not legally be compelled to pay anything for the water consumed and used, yet said that the plaintiff was quite willing to pay if allowed the 50 per cent. deduction. Reliance was placed upon the case *Attorney-General v. Donaldson*, 10 M. & W. 117, but I do not perceive the application of that case, which seems to me to have gone off on the pleadings.

It is, however, intimated in the judgment of Baron Alderson that although a sewer rate might be levied upon land in the occupation of servants of the Crown, yet it could not be levied, any more than the ordinary process of law could be executed, within the precincts of the royal palace occupied as the residence of the sovereign, by reason of the respect due to the royal person.

It was also contended that there is not equality in the ^{Judgment.} by-law and that in it is contained a discrimination against Ferguson, J. the Crown. To this it was answered by defendants' counsel that the persons liable to pay city taxes are paying and are obliged to pay the cost of the construction of water works wherewith the water is supplied, amounting to several millions of dollars; that in favour of these the benefit of the reduction is offered and given on condition of prompt payment, as stated in the by-law; and that there is no burden imposed as against the Crown or others, but simply the denial of this conditional benefit to such institutions as are exempt from the payment of city taxes. This I think a fair statement of the matter, and assuming it so to be, I was not given any authority going to shew that the by-law is invalid, nor have I found any such authority, and my conclusion is that the by-law is not shewn to be invalid by anything that has been made to appear.

It was also urged on the part of the defence that the power given by the 19th section of the Municipal Water Works Act of 1882 to fix the rate or rent to be paid for the use of water by public buildings was a full justification for the passage of the by-law.

I do not know that the by-law was passed in pursuance of that power. It would rather appear that it was not. However this may be, or whatever may be the effect one way or the other, such power seems to exist, and I apprehend the properties in question, or mentioned in the statement of claim, are public buildings, as probably are all the institutions referred to in the by-law.

It was for the plaintiff contended that the provisions of sub-sec. 2 of the same sec. 19 shew that the water rates must be considered to be a tax. I am not of this opinion. I think the sub-section only provides for a convenient and safe method of collecting the prices to be paid for the water. It provides for a lien and charge, and for the levy and collection, if need be, in the same manner as municipal rates and taxes are by law recoverable. This indicates

Judgment. to me that these moneys are not taxes, but secured and
Ferguson, J. collectable in the same manner as if they were. On the
whole case I am, for the reasons that I have endeavoured
to give, of the opinion that the plaintiff's case fails,
and that the action should be dismissed, and I think there
should be costs to the defendants.

Judgment accordingly.

G. A. B.

[CHANCERY DIVISION.]

FINLAY V. MISCAMPBELL.

Master and servant—Workmen's Compensation for Injuries Act—Factories Act—Negligence—Contributory negligence—R. S. O. 1887, c. 141, ib. c. 208.

The plaintiff was employed by a sub-contractor to do work upon lumber after it had left the defendants' saw mill, and before it was shipped. To get some fresher water to drink than that supplied by the sub-contractor, the plaintiff went through the saw mill (in which he had no business in connection with his work), and in returning, going out of his way through the mill, to assist a workman who was in difficulty with some planks, he fell into an unguarded hole in which a saw was working and was injured :—

Held, that under these circumstances, the plaintiff could have no claim against the defendants, either under the Ontario Factories Act, R.S.O. 1887, c. 208, or the Workmen's Compensation for Injuries Act, ib. c. 141.

Even though the plaintiff might be a person in the service and employment of the defendants within the meaning of the Ontario Factories Act, as amended, yet the duties prescribed by that Act can be enforced only by penalty ; no civil liability is imposed on the owner of the factory if apart, from the statute, he would not have been liable at common law, except that the Act may be used for evidential purposes in regard to the place of the accident being dangerous, and requiring protection (as e.g. *per* FERGUSON, J., sec. 15 shews the hole in this case to have been). But here the defendants would not be so liable on account of the contributory negligence of the plaintiff.

THIS was an action brought by James Finlay against Statement the firm of Miscampbell & Dickinson, for injuries sustained by the plaintiff as a workman and employee of the defendants within the meaning of the Workmen's Compensation for Injuries Act, and the Ontario Factories Act, R. S. O. 1887, chs. 141, 208, and amending Acts, in their saw mill in the town of Midland.

The facts of the case appear sufficiently from the judgments, but it may be remarked by way of introduction that the plaintiff, who worked outside the mill, met with the accident complained of while returning through the mill, across which he had gone to obtain a drink of water. He fell into a hole or opening in the floor of the saw mill, into which the refuse from the planks cut by that part of the machinery called the edgers, fell, and where it was cut into laths by a saw placed therein. The plaintiff fell upon

Statement. the saw in the hole and sustained grievous injuries, meeting with the accident as he alleged in his statement of claim "by reason of the said hole or opening in the floor not being protected or guarded in any way."

The action came on for trial before ROSE, J., and a jury at Lindsay, on April 7th, 1890.

W. Laidlaw, Q. C., and W. F. Kerr, for the plaintiff.
B. B. Osler, Q. C., for the defendants

At the close of the plaintiff's case the defendants moved for a nonsuit.

ROSE, J.—I have heard all the counsel have to say upon the question of law, and I think the difficulties in the plaintiff's way as a matter of law, are insuperable. He is employed, I will assume as contended for by his counsel, by the defendants to do work outside of the mill, that is to say, outside of the portion of the mill where the difficulty arose. Now it does not appear upon the evidence that he could not have satisfied his thirst from water provided for the hands in the mill at a place much nearer than the point to which he went, and without being able to tell us that there was not water there and water provided which would have been more convenient of access, he chose to go to a distant point across the mill and across the works and machinery in the mill. Returning from that place the accident occurred. He admits that if he had confined himself simply to going to the place where the water was and returning, without more, he might safely have made his journey as he had theretofore done on several occasions, and as other men had done on several occasions. But going to the place in question he observed a workman in some little difficulty with a board and volunteered assistance; an act of good nature on his part, but it was a voluntary act, not in the course of his employment, and for which he was not paid. And if that act had taken much time

Judgment.

Rose, J.

so as to have prevented him going on with the work at which he was employed, he would have been open to reprimand by his employer for neglecting the duty to which he was specially sent. I am not sure but that is a fair test of whether he was then doing his duty. He was employed for one particular service, and if he chose to neglect that, say for half an hour or an hour, and the work which he ought not to have left was thereby neglected and a loss had happened to his employer, clearly he would have been blameworthy; and if he had been discharged from his employment for his act, possibly he would have had no answer to make to his employer. Therefore, being in such place at such a time, and doing a work which he was not called upon to do, and contrary to his instructions, and contrary to the terms of his employment, it is difficult to see how he was at that moment for that purpose a servant having a claim upon his employer within the meaning of the statute. I feel perfectly clear in my own mind that one is not bound to fence a dangerous way against another to whom he gives license to use the way. He gives him permission to use the way as it is, and if he do not chose to use it with its danger, he may not use it at all. He cannot say, "you were good enough to let me use a dangerous way for my own convenience, and I impose upon you the obligation of making it safe." Mr. Laidlaw admits that at common law he cannot succeed, but claims under the statute (R. S. O. 1887, ch. 141, as amended by 52 Vict. ch. 23, sec. 6 (O.)). I feel it almost impossible to apply that section of the Act in his favour; I think I have to construe the words as they read.

I give effect to the objection, and hold that there is no evidence to go to the jury, and record judgment for the defendants, dismissing the action.

The plaintiff now moved before the Divisional Court by way of appeal from this judgment, and the motion came on for argument on June 10th, 1890, before BOYD, C., and FERGUSON, J.

Argument.

Laidlaw, Q.C., and Kerr, for the plaintiff, appellant. We refer to *Baddeley v. Earl Granville*, 19 Q. B. D., 423, as to what is a defect. The Factories Act is R. S. O. 1887, ch. 208, and defines Factory, sec. 2, sub-sec. 1. See also, especially, sec. 15. The Act of 1889, 52 Vict. ch. 43, sec. 3, sub-sec. 4 (O.), applies to this case. The obligation being statutory,—a legislative declaration of the defendants' duty,—it must be held to be a declaration of the defendant's duty towards all his workmen. The use by the plaintiff of what he knew was a dangerous way, is not a bar to his action. We are brought to this, that the defendant has been guilty of negligence, and the plaintiff has suffered from the negligence,—unless then the plaintiff has been guilty of contributory negligence, he has a right to recover. It was the want of the protection which the statute requires the defendant to have that caused the injury. Is there anything which takes away the plaintiff's right of action? Was he guilty of any contributory negligence? See *Anderson v. Northern R. W. Co.*, 25 C. P. 301; *Maw v. Townships of King and Albion*, 3 A.R. 248; *Brown v. Great Western R. W. Co.*, 52 L. T. N. S. 622. The case must come to this narrow point—the way being permissive, he having the right to go—the mere fact of his raising the board to help his fellow-workman was not such an act as debars him from his legal remedy, for it was not the raising of the board which caused the injury. It was the negligence of the defendants which caused the injury. We cite also *Gordon v. City of Belleville*, 15 O. R. 26; *Morrison v. Baird*, 10 Court of Sess. (4th series), 271; *Brown v. Butterley Coal Co.*, 53 L. T. N. S. 965. [BOYD, C.—In this case the plaintiff was not pleasing himself. He was seeking to help a fellow-workman, and so was acting in his employers' interest.]

Kerr on same side. *Cox v. Hamilton Sewer Pipe Co.* 14 O. R. 300, shews the liberal view that has been taken in these cases.

McCarthy, Q. C., and H. S. Osler, for the defendants. In *Pritchard v. Lang*, 5 T. L. R. 639, attention is called to the fact that it seems now to be supposed that under the

Employers' Liability Act, it is merely sufficient to prove Argument that a workman has been injured. The plaintiff had nothing whatever to do in the mill. The boards were a completely manufactured article before the plaintiff had anything whatever to do with them. It is said that the plaintiff had a right to go and get water. But there is no legal duty on an employer to supply his men with water any more than with beer and cider. Besides, Graham, a sub-contractor, under whom the plaintiff was working, supplied water himself. We say no man had a right to cross the mill in the way the plaintiff did. If we had invited the plaintiff, or had any legal liability to supply the plaintiff with water, it is not denied that he could have gone safely round the mill to the same point. It may be true we saw men going in the way the plaintiff went. It may be so; but they went at their own risk. As to the Factories Act, the amending Act makes the owner of the factory liable to the workmen of the sub-contractor. The plaintiff places his case on sec. 15, sub-sec. 1 of R. S. O. 1887, ch. 208, and says there was a breach of that sub-section. Now *Hamilton v. Groesbeck*, 19 O. R. 76, is on this section, and appears properly decided. Can it be said that a mere opening in the floor is a dangerous place? The saw was guarded. The plaintiff does not rest his case on the saw not being properly guarded. It is the hole, he says, was not properly guarded. The hole was for the waste coming from the saw. The ends being cut off dropped into the hole. Can this be said to be a dangerous place? Every man in the mill must have known of the existence and locality of this hole. The plaintiff's witnesses do not pretend that they ever saw such a hole as this guarded or protected. It was not practicable to guard it. Turning now to the other Act, the further observation, we have to make will apply to both statutes: R. S. O. 1887, ch. 141, and 52 Vict. ch. 23 (O.), under sec. 6 of which latter Act the plaintiff claims. But this man's work was taking the boards ready manufactured and putting them on the tramway. Under this amending Act, therefore, the liability is not increased

Argument.

so as to affect this case. Section 3 is said to cover the plaintiff's complaint. Now as to defective ways, and what constitutes a defect, see Beven's work on Negligence, p. 419. "Defective" means "not in a proper condition for its purpose." *McGiffin v. Palmer Shipbuilding Co.*, 10 Q. B. D. 5, is in point. *Howe v. Finch*, 17 Q. B. D. 187, deals with the meaning of 'ways' and 'works.' Under the Employers' Liability Act there is no right of action in any view. Coming back to the Factories Act, can it be said there was any more liability to the man who put the boards on the tramway than to the man who carted them to the railway. In the case of *Pritchard v. Lang*, 5 T. L. R. 639, there was a choice of ways, and the man chose to go by a way which was not the proper way, and the Court held that there could be no liability. The doctrine of *volenti non fit injuria* has no application here, but that of contributory negligence may have. We are charged with negligence, and if it turns out that injury was the result of the plaintiff's negligence, then the Judge non-suits. Was a man with his eyes open to walk into the hole, because it was not guarded?

Laidlaw, in reply. The plaintiff was not crossing the mill during the operations of the mill, but preceding the operations of the mill re-commencing. It is not contended that a railing round the hole would interfere with the ends of the boards passing into the hole, which was its purpose. *Bolch v. Smith*, 7 H. & N. 736, is a different class of case. I refer also to *Radley v. London and North Western R. W. Co.*, 1 App. Cas. 754.

September 4th, 1890. **BOYD, C. :—**

According to the notice before action the complaint is that the plaintiff sustained injury through defects in the condition and arrangement of the ways, works, machinery, and plant connected with and used in the defendants' business as saw-millers, and particularly through the place where the refuse from the edger fell being left open and wholly unprotected, into which the plaintiff fell while in the defendants' employment.

The action was dismissed by the Judge at the close of the plaintiff's evidence, and there are several reasons why this should be supported.

Judgment.

Boyd C.

The plaintiff was employed by one Graham to do work upon the lumber after it had left the mill and before it was shipped. He worked at a trimmer in a lean-to attached to the main building, and did not use any of the machinery connected with the mill proper. He had nothing to do with the edger in front of which the accident happened. The branch of the work done by Graham was distinct from that which was directly conducted by the defendants.

The accident happened because of the plaintiff crossing the interior of the mill to get a drink of water. On returning the same way the machinery was started, and he, stepping in front of the edger to help the man working there for the defendants, missed his footing and fell backward towards the saw. In his fall he broke the guard which was before the saw, one leg slipped into the hole in the floor in front of the edger and so came in contact with the saw when in motion. There is evidence that water was provided for Graham's men on the side of the mill where the plaintiff worked. But the plaintiff preferred to get this other water which was said to be fresher or colder, and did not go round to it by a safer road but hurried across the mill during a short pause when parts of the machinery were being oiled. No complaint appears to have been made about the supply of water for Graham's men, and upon the evidence the plaintiff seems to have been content to get to the water supplied to the mill-hands by this "short cut," as he saw some of the other men doing.

The Workmen's Compensation Act and its amendments do not apply to this case, because of the non-existence of the relationship contemplated by the Act. The defects alleged in the construction and arrangement of the edger were not defects in any ways &c., to be used by the plaintiff or by Graham his employer in executing his proper work in the establishment. (See 52 Vic. ch. 23, sec. 6.)

Judgment.

Boyd, O.

It may be that the plaintiff is within the meaning of the Factories Act as amended, a person in the service and employment of the defendants, (see 52 Vic. ch. 43, sec. 3, (4)), and as such is entitled to complain of the want of safeguards at the hole in the floor at the front of the edger (R. S. O. ch. 208, sec. 15). In this view his action, if any, would be for breach of duty in leaving the hole unguarded as at common law, the Factories Act being of use only for evidential purposes in regard to the place of the accident being dangerous and requiring protection. But in cases of this kind the principle applicable to entitle the plaintiff to succeed is to be found in the language of Lord Chelmsford in *Wilson v. Merry*, L. R. 1 Sc. App. at p. 341: "The statutable duty is, no doubt, created absolutely for the purposes of the Act; but it is a duty which, if unperformed can only be enforced by the penalty, and this for the protection of the public is to be recovered against the owner or occupier who causes the work to be done. If an individual sustains an injury in consequence of the work being imperfectly or improperly performed, a civil liability is not imposed upon the owner, if without the statutable obligation he would not have been liable." Now here though the statute may require the defendant to guard the hole, as against the plaintiff contributory negligence affords a defence: *Britton v. Great Western Cotton Co.*, L. R. 7 Exch. 130.

The plaintiff's position cannot be placed higher than that of a person who was on the defendant's premises with his permission. And the user by him of the way across the mill cannot be put on a higher level. The plaintiff who was not a stranger to the locality, but having worked there over a month, had a competent knowledge of the risks he ran in taking this "short-cut." As licensee using this means of reaching the water-butt, the plaintiff took it at his own risk, and from his own evidence he would have returned safely, but for his kindly act to the other workman. But in these circumstances liability cannot be fixed on the defendants: the plaintiff was not on

their business, or indeed at his own work, at this point. Having been injured as a consequence of his own voluntary act he must abide what has happened. *Pritchard v. Ling*, 5 T. L. R. 639 is very much in point, and so also *Woodley v. Metropolitan District R. W. Co.*, 2 Ex. D. 384; *Crafter v. Metropolitan R. W. Co.*, L. R. 1 C. P. 300.

Judgment.

Boyd, C.

Judgment should be affirmed with costs.

FERGUSON, J. :—

The defendants were the owners of the factory. The plaintiff was employed by one Graham who had a contract with the defendants for the execution of a certain part or kind of their work, and the work in which the plaintiff was engaged under his employment with Graham was being executed under that contract. The Factories Act, R. S. O. 1887, ch. 208 defines "employer" as any person, who on his own behalf or as manager &c., &c., has charge of any factory and employs persons therein. The Factories Amendment Act of 1889, 52 Vic. ch. 43, sec. 3, sub-sec. 4, provides that the workmen &c., of a contractor to do work for the owner shall, for all purposes of that Act and the the principal Act as amended by that Act, be considered and taken as being in the service and employment of the owner. The plaintiff, then, must be considered and taken for all purposes of the Factories Acts as in the service and employment of the defendants, the owners. These Acts (the Factories Acts) are however penal only, and do not expressly give any right of action to a person injured.

"The Workmen's Compensation for Injuries Act," R. S. O. 1887, ch. 141, does not define "employer" further than to make it include bodies of persons corporate and incorporate. By the "Workmen's Compensation for Injuries Amendment Act," 1889, 52 Vic. ch. 23, (O.), sec. 2, sub-sec. 4, "employer" is made to comprehend, amongst others, the person liable to pay compensation under the 6th section of the Act, and that 6th section provides that, when the execution of any work is being carried into effect under any contract and

Judgment. the person for whom the work or any part thereof is being done, owns or supplies any ways, works, machinery, plant, buildings, or premises used for the purpose of executing the work, and by reason of any defect in the condition or arrangement of such ways, works, machinery, plant, buildings, or premises personal injury is caused to any workman employed by the contractor or by any sub-contractor, and the defect, or the failure to discover or remedy the defect arose from the negligence &c., * * the person for whom the work or that part of the work is done shall be liable to pay compensation for the injury as if the workman had been employed by him, and for that purpose shall be deemed to be the employer of the workman within the meaning of the Act and the principal Act, (R. S. O. 1887, ch. 141.

The amendment does not, however, apply to the present case because the injury to the plaintiff did not occur by reason of any defect &c., in any ways, works, machinery, &c., owned or supplied by the defendants for the purpose of doing the work under the contract between the defendants, and Graham, where the plaintiff was a workman working under and pursuant to his employment by Graham, and, as the plaintiff was not in fact employed by the defendants he was not in the employment of the defendants so as to make the defendants liable to him under the Compensation for Injuries Acts except under the provisions of section 6 of the Amendment Act ch. 23, 52 Vic. (O.), and these provisions do not apply to the case. It follows that the case does not fall under the provisions of the Workmen's Compensation for Injuries Acts at all, and whatever remedy the plaintiff has is under the Factories Acts so far as these may be available, and the common law.

The Factories Acts are penal and do not give a personal action for an injury to an employee, and the question arises as to whether or not such an action lies in a case like the present one.

In the 6th edition of Addison on Torts, at p. 74, the

author after stating the effect of the decision in *Couch v. Steele*, 3 Ell. & Bl. 414, and referring to *Rowning v. Goodchild*, 2 Wm. Bl. 906 says: "But a person is not necessarily entitled to maintain an action because he can shew that he has sustained injuries from the non-performance of a statutory duty. Whether in such a case an action is maintainable must depend to a great extent upon the provision of the Legislature in the particular case and the language there employed." Judgment.
Ferguson, J.

The author has manifestly taken this statement from the language of Lord Cairns in the case *Atkinson v. Newcastle and Gateshead Water Works Co.*, 2 Ex. Div. 441, at p. 448.

It is further stated by the same author at pp. 74, 75, that where no specific right is created and vested in the plaintiff for his own benefit and advantage, and no specific duty in favor of the plaintiff has been imposed, but the statute merely prohibits a thing from being done under a penalty for doing it, an action for damages is not maintainable; and further, when a duty or obligation exists at common law independently of the statute, a new remedy given by the statute is simply cumulative, and does not preclude the ordinary common law remedy by way of action unless there are express words to that effect: referring to Com. Dig. Action upon Statute C, and *Chapman v. Pickersgill*, 2 Wils. 145. See also the last or concluding clause in the judgment in *Rowning v. Goodchild*, 2 Wm. Bl. at p. 910.

The Factories Acts seem to me to contain provisions and impose duties for the benefit and advantage of those employed in the factories. A perusal of the 14th section of the principal Act, as also some others that precede it, as well as some that follow it, seems to me to make this manifest. The plaintiff is, as I have said, in the circumstances to be considered and taken, *for the purposes of the Factories Acts*, as in the employment of the owners of the factory, but the Factories Acts do not give the action, and the fines and penalties imposed and recovered under their

Judgment. provisions are to be paid over to the treasurer of the
Ferguson, J. Province, for the use of the Province.

It appears to me that the hole in the floor of the factory mentioned in the pleadings and the evidence, should have been guarded, and that leaving it unguarded, assuming that it was so left, was a breach of the obligation imposed by the 15th section of the principal Act.

These Factories Acts are public Acts, and public in their nature, and not such as was the Act in the case *Atkinson v. Newcastle and Gateshead Water Works Co.*, 2 Ex. D. 441, which was considered to be a legislative bargain with a body of undertakers, &c., and after a careful perusal of the judgments in that case, where the doctrine laid down in *Couch v. Steele*, 3 El. & Bl. 414, is gravely doubted, but the decision not overruled, and after looking at all the authority I have found bearing upon the immediate subject, and after having, as well as I have been able, considered the provisions of the Factories Acts themselves, I have arrived at the conclusion that the plaintiff is not precluded by reason of the penal remedies given by the Acts from maintaining an action grounded upon the negligence of the defendants in failing to perform the duty imposed by section 15 of the principal Act of properly and securely guarding, as far as practicable, this hole in the floor of the factory. But the action I speak of is by no means an action given by the statutes, but in the nature of a common law action on the case in which the plaintiff may avail himself of the provisions of this section 15, and the evidence of the failure of the defendants to perform the duty imposed by it in making out his case of negligence against the defendants. So far, and so far only, I think can the plaintiff avail himself of the provisions of the Acts.

Then assume that the plaintiff in this way succeeded in shewing that the defendants were guilty of negligence that materially contributed to the unfortunate occurrence, and assuming even that he went rightly, that is by implied permission or license, where he did in order to get the water spoken of, I think he also shewed in his evidence

that in taking the route that he did take, which is clearly ^{Judgment.} shewn to have been a dangerous one, when he might have ^{Ferguson, J.} taken another one much safer, I may say one which on the uncontradicted evidence was entirely safe, and in departing from the way, or rather the route through the factory and machinery which he took and which he and others had gone before, in order to assist a workman in the factory who was doing or endeavouring to perform his work at or near this hole in the floor and doing as he did while so assisting, he was himself guilty of negligence which also materially contributed to the accident, and, when the propositions of negligence and contributory negligence are so interwoven that the contributory negligence is brought out and established by the evidence of the plaintiff's witnesses, and there is no conflict on the facts in proof, the Judge may properly withdraw the case from the jury as was done in this case. See *Wakelin v. London and South Western R. W. Co.*, 12 App. Cas. at p. 52.

I think the non-suit was right and that the judgment should be affirmed.

A. H. F. L.

[CHANCERY DIVISION.]

THE CORPORATION OF THE TOWN OF MEAFORD V. LANG
ET AL.

Principal and surety—Official bond—Collector of taxes—Municipal corporations—Release of sureties—Non-disclosure—Constructive fraud.

In an action by a municipal corporation against the sureties to the bonds of a defaulting collector of taxes, for the due performance of his duties for 1886 and 1887, it appeared that there had been great laxity on the plaintiffs' part, but that shortly before he absconded, in 1888, a majority of the members of the corporation had confidence in his honesty; while the defendants had not sought information from the plaintiffs as to the way he had performed his duties in former years :—

Held, that the non-disclosure by the plaintiffs to the defendants of a notice of motion having been made in council in 1885 that if the roll for 1884 was not returned by the next meeting, an enquiry before the County Court Judge would be asked for; or of a resolution in August, 1885, instructing the treasurer to take proceedings against the collector and his sureties for the balance due on the 1884 roll, unless fully settled before September 10th next, which it was; or of another like resolution in 1886, in reference to the taxes of 1885, which were afterwards, in 1888, paid over in full by him, and of the non-return by him of the 1885 roll until 1898, were not such non-disclosure as amounted to constructive fraud on the plaintiffs' part sufficient to relieve the defendants from liability on their bonds.

Statement.

THIS was an action brought against the sureties under two official bonds conditioned for the due performance of his duties by Andrew Watt, as collector for the town of Meaford.

The facts of the case are fully set out in the judgment.

The evidence having been taken at the Spring Assizes, 1889, at Owen Sound, before MACMAHON, J., the argument was adjourned to Toronto, and took place there on June 14th, 1890.

Cassels, Q.C., for the plaintiff. Watt was always considered an honest man: there was no bringing home to the corporation that he was dishonest: *Mayor of Durham v. Fowler*, 22 U. C. R. 394.

Kerr, Q.C., for the defendants. When the resolution of June, 1884, was passed, Watt was three years in arrear. He always had three rolls in hand. The plaintiffs continued him in the office of collector after he was in default.

There was a concealment and withholding here : *Township Argument of Adjala v. McIlroy*, 9 O. R. 580 ; *Phillips v. Foxall*, L. R. 7 Q. B. 666 ; *Sanderson v. Osler*, L. R. 8 Ex. 73 ; *Railton v. Mathews*, 10 C. & F. 934 ; *Corporation of Gananoque v. Stunden*, 1 O. R. 1.

July 21st, 1890. MACMAHON, J. :—

Action tried before me, without a jury, at the Spring Assizes at Owen Sound, in May, 1889—the argument taking place on June 14th, 1890.

The action is on two bonds given by the defendants as sureties for one Andrew Watt, as collector of taxes for the town of Meaford, the first bond being dated the 6th of October, 1886, and is in the penal sum of \$6,000, and is conditioned for the collecting and paying over by Watt as collector for the year 1886, of all moneys collected by Watt to the treasurer of said town and to return the roll to said treasurer on or before the 24th of December, 1886, or on or before such other day not later than the 1st of February, 1887, as the council of the town should appoint, and that he should perform the other duties as collector as provided by law and the by-laws of the said municipality.

The second bond is dated the 31st of October, 1887, and is in the penal sum of \$4,000, with like conditions as to the performance by Watt of his duties as collector for 1887—the last day mentioned for the return of the roll being February 1st, 1888.

Watt absconded to the United States on the 21st of May, 1888, and the allegation in the statement of claim is, that he appropriated to his own use \$123.62 taxes of the year 1886, and \$2,374.60 taxes of 1887 = \$2,498.22.

Watt had been collector for the town from and inclusive of the year 1879 until the time of his leaving the country.

What is alleged in the statement of defence is, that prior to the execution of the bond for 1886, Watt in his former employment by the plaintiffs as collector, had committed divers defaults of a like kind as those sued for in

Judgment. the statement of claim, and the plaintiffs designedly neglected to notify the defendants thereof at the time of the execution of the said bond, and the defendants had no knowledge of such prior defaults, and that notwithstanding such knowledge the plaintiffs appointed Watt collector for 1886, and continued to retain him in their service.

MacMahon,
J.

There is a like defence as to the 1887 bond.

Another ground of defence is that Watt collected large sums of money for taxes due for 1887, and paid such money to the plaintiffs, but with knowledge of the plaintiffs, and in fraud of the defendants, such sums were credited as for taxes collected for previous years for which the defendants were not responsible, and the defendants ask that credit be given for the moneys paid as on the year for which they were paid to the collector.

The other defence is that Watt was appointed collector after the 1st of October, contrary to the provisions of the Municipal Act.

In the particulars furnished by the defendants they say that after Watt received the 1886 roll he received large sums of money thereon, which he applied on the roll for 1885; and after he received the 1887 roll large sums of money were paid him on the taxes of that year, which he applied on the 1886 roll.

There appears to have been great laxity in the manner of conducting the business of the corporation so far as its insistence of the performance by the collector of his duties is concerned.

On the 9th of June, 1884, Watt having still in his possession and unreturned the rolls for 1881, 1882, and 1883, a resolution was passed by the council that the time for returning the different rolls be extended for two weeks, and if not then returned the treasurer was authorized to proceed under the 195th section of the Assessment Act against the collector for the recovery of the amount still due and unpaid on said rolls. That resolution was rescinded on the 23rd of June, but after it was moved and carried Watt returned the rolls for 1881, 1882, and 1883.

In August, 1884, on making enquiries in the treasurer's office as to the amount of the 5 per cent. collected on the taxes liable to that payment for the years 1881 and 1882, Watt who was present replied that for the former year the sum of \$20 had been returned and for 1882 the sum of \$30, which sums Watt represented was much more than was coming from that source. But it turned out upon investigation there was the sum of \$124 payable, and Watt either paid \$100 in full or that sum was debited to him by the council.

Judgment.

MacMahon,
J.

On the 20th of July, 1885, there was a notice of motion by Councillor Robinson : " That if the collector of taxes for 1884 does not return the roll for that year completed I shall ask for an enquiry before the Judge of the County Court respecting the same."

At the time this notice of motion was given I find there was about \$2000 of taxes which had not been paid to the treasurer.

On the 31st of August, 1885, a resolution was passed instructing the treasurer to commence an action on behalf of the corporation against Watt and his sureties for the recovery of the balance due on the 1884 roll unless the same was fully settled before the 10th of September.

Mr. Stewart, the treasurer, thought he had been instructed by the council to issue a warrant against Watt and his sureties under the Assessment Act R. S. O., 1887, ch. 193, sec. 231, and before taking such proceedings consulted Mr. Pollard, a solicitor of Meaford, who advised that the time allowed by the Act for issuing a warrant had elapsed, and that the treasurer could not proceed under that section and Mr. Stewart so reported to the council.

Further time was given for the return of the 1884 roll by resolution of the council, and during September and October, 1885, Watt paid to the treasurer on account of the uncollected taxes for 1884 the sum of \$1,788.

On the 13th of October, 1885, a resolution was moved, and lost on a vote of 9 to 2, requesting the County Court Judge to investigate the accounts of Watt, under sec. 480,

Judgment. Municipal Act, 1883, 46 Vict. ch. 18 (O)., Watt having failed
MacMahon, to account to the treasurer, &c.

During 1886 resolutions were, from time to time, passed extending the time for the return of the 1885 roll, until the 19th of July, when a motion was passed to introduce a by-law at the next meeting of the council, authorizing the treasurer to take proceedings against the collector and his sureties for the recovery of the amount of taxes not paid in for 1885.

Subsequent to this, resolutions were passed at the different meetings of the Council extending the time for the return of the 1885 roll.

Watt was not an applicant for the collectorship for 1886, but the Council appointed him to the position.

On the report of a committee of the council Watt was, on the 24th of October, appointed collector for 1887, the roll not to be delivered to him until he had given security.

Upon completion of the bond for 1887, by the defendants, the roll for that year was delivered to Watt who then had in his hands the rolls for 1885, 1886, and 1887, all being retained by him until the 10th of February, 1888, when the roll of 1885 was returned. The collector thus had the opportunity under this vicious system—which it is alleged by the defendants was taken advantage of by him—to pay off or reduce the balances due for the earlier years from the collections made from the last year's taxes.

Watt did not return to the treasurer the 1886 roll; but he left at the treasurer's house during the last weeks of January, 1888, the roll for 1887 without the return as required by law, and the roll was brought by the treasurer and placed before the council, who on the second of February passed a resolution that the roll be given back to Watt to collect the balance of taxes thereon, and that he be given to the 1st of March to finally return the roll. There was no return of the roll and so no new appointment was made as contended by the defendants' counsel.

On the 13th of February, 1888, the treasurer was directed to take proceedings against the collector for

enforcing the return of the 1886 roll. And on the 14th of May, 1888, the chairman of the finance committee was requested to ask the collector to return the rolls for 1886 and 1887.

Judgment.

MacMahon,
J.

On the 17th of October, 1887, a committee to which was referred the appointment of a collector for that year reported that the balance due on the 1885 roll was \$209.17; balance on 1886 roll \$921.37.

On the 30th of January, 1888, a committee to whom was referred the rolls for 1885, 1886, and 1887, reported the 1885 roll as all collected and paid over; the balance due on 1886 roll as \$428.12; and the balance due on the 1887 roll as \$3410.78.

On the 24th of May, 1888 (three days after Watt had left the country) the committee reported that they found the amount of the roll for 1886 charged to the collector to be \$7990.87; that there was paid to the treasurer on this \$7785.62, leaving a balance of \$205.25; they found apparently still due on the roll \$530.02—the amount therefore overpaid to the treasurer on the 1886 roll would be \$324.77—they found the amount apparently still due on the 1887 roll to be \$217.38. The committee reported that there are no payments marked on the rolls, and it is only by the receipts that were still in the late collector's receipt books not being torn out that they have been able to reach the findings they make.

Watt seems to have been regarded even by those members of the council who opposed his appointment as collector as being an honest man, at least up to 1884, when it was discovered that the whole of the five per cent. collected on the overdue taxes had not been accounted for. Some of the councillors regarded that transaction as bordering on delinquency.

Watt was always slow in making his returns and that appears to have been the chief cause of complaint by the council and the treasurer, but up to the occasion above referred to there appears to have been no imputation of dishonesty.

Judgment.

MacMahon,
J.

John Hill, one of the defendants, was a member of the town council in 1884, and knew of the position Watt occupied to the council in relation to the rolls then in his hands. Hill was cognizant of the action taken by the council respecting the five per cent. collected by Watt, and of the authorization by the council to the treasurer to proceed under section 195 against the collector for the recovery of the amount still due and unpaid on the rolls, and he (Hill) does not appear to have regarded Watt as blameworthy as he was willing to become surety for him in 1886.

The notice of motion of councillor Robinson of the 20th of July, 1885, that if the roll for 1884 was not returned completed by the next meeting of the council he should ask for an enquiry before the County Court Judge respecting the same, and the resolution of the 31st of August, 1885, instructing the treasurer to take proceedings against the collector and his sureties, and in regard to which action the treasurer consulted Mr. Pollard, and also the resolution passed in council on the 19th of July, 1886, for introducing a by-law authorizing the treasurer to proceed against the collector and his sureties for the recovery of the amount of the taxes not paid in for 1885, are pointed to as circumstances which should have been communicated to the defendants before executing the bonds in question, and that such non-communication was a fraud upon the defendants freeing them from liability as sureties for Watt.

"It is sufficient if it appears that the plaintiffs knowingly assisted in inducing the defendant (the surety) to enter into the contract by leading him to believe that which the plaintiffs (the creditors) knew to be false, knowing that if he had not been thus misled he would not have entered into the contract * * To constitute a fraudulent misrepresentation, it need not be made in terms expressly stating the existence of some untrue fact. But if it be made by one party in such terms as would naturally lead the other to suppose the existence of such a state of facts, and if such statement be so made designedly and fraudu-

lently, it is as much a fraudulent misrepresentation as if the statement of the untrue facts were made in express terms": *Lee v. Jones*, 11 Jur. N. S. p. 86, 87, cited by Mowat, V. C., in *Peers v. Oxford*, 17 Gr. at p. 475. Or as shortly put by Mowat V. C. in the last case at p. 475: "Though fraud must be made out in order to invalidate the contract of a surety, it is not necessary there should be any misleading by express words."

Judgment.
MacMahon,
J.

To a like effect is the language of Blackburn, J., in *Lee v. Jones*, 17 C. B. N. S. p. 507.

A number of the latest cases on suretyship are reviewed in *The Corporation of the Village of Gananoque v. Stunden*, 1 O. R. 1, and *Corporation of Township of Adjala v. McElroy*, 9 O. R. 580.

The question in the present case is, whether there were any circumstances in the relationship or position of Watts to the corporation of which the defendants as intended sureties were, or either of them was, ignorant, which it was the duty of the corporation spontaneously to disclose to the defendants before permitting the latter to execute the bond? This question was discussed by Fry, J., in *Davies v. London and Provincial Marine Ins. Co.*, 8 Ch. D. pp. 474-5: "Where parties are contracting with one another, each may, unless there be a duty to disclose, observe silence even in regard to facts which he believes would be operative upon the mind of the other, and it rests upon those who say that there was a duty to disclose, to shew that the duty existed. * * It has been argued here that the contract between the surety and the creditor is one of those contracts which I have spoken of as being *uberrimæ fidei*, and it has been said that such a contract can only be upheld in the case of there being the fullest disclosure by the intending creditor. I do not think that that proposition is sound in law. I think that, on the contrary, that contract is one in which there is no universal obligation to make disclosures, and therefore I shall not determine this case on that view. But I do think that the contract of suretyship is, as expressed by Lord Westbury in *Williams*

Judgment. v. *Bayley*, (L. R. 1 H. L. at p. 219), "one which should be
MacMahon, based upon the free and voluntary agency of the individual
J. who enters into it."

In *Lee v. Jones* (in Error), 17 C. B. N. S., Blackburn, J., at p. 503, refers with approval to what was said by the Chief Baron during the argument of the case that "a surety is in general a friend of the principal debtor, acting at his request and not at that of the creditor; and in ordinary cases it may be assumed that the surety obtains from the principal all the information he requires; and I think that great practical mischief would ensue if the creditor were by law required to disclose everything material known to him, as in a case of insurance."

Lee v. Jones, as pointed out by De Colyar on Guarantees, 2nd ed., p. 334, was a case of misrepresentation, rather than one of mere concealment.

In *The Corporation of Gananoque v. Stunden*, 1 O. R. 1, the judgment, by the majority of the Court, in favour of the defendant, was on the ground that he was induced to execute the bond sued on as surety for the treasurer by a representation made by the reeve of the municipality that the treasurer was not in arrear. This turned out to be a misstatement but was made innocently, and Hagarty, C. J. was of opinion that as the statement was not false to the knowledge of the reeve who made it, the plea of fraud could not be sustained.

The decision in the case of *North British Ins. Co. v. Lloyd*, 10 Ex. 523, is evidently quite in harmony with the doctrine which prevailed in Courts of Equity, namely, that in order to entitle a surety to relief in equity on the ground of misrepresentation or concealment at the time of the contract he must make out a case amounting to fraud: De Colyar on Guarantees, 2nd ed. 338.

Then what is the fraud which can be charged against the corporation here? A settlement of the five per cent. collections had been effected a year prior to the defendants becoming sureties on the first bond, and even in relation to that particular transaction but few of the members of

the council harboured the suspicions regarding Watts' honesty which Mr. Robinson entertained. In fact, up to a short time prior to Watts leaving the country, the confidence of the large majority of the members of the council appears not to have abated; and while regarding him as being altogether too lenient in enforcing prompt payment of the taxes their faith in his honesty remained unshaken. I therefore cannot see where the evidence is of fraud upon the part of the corporation which it is incumbent upon the defendants to shew in order to relieve them from liability.

Judgment.
MacMahon,
J.

The defendants do not appear before becoming sureties to have sought information from the council or treasurer regarding the performance by Watts of his duties as collector in former years, or whether the roll for 1885 had been returned, or how much remained uncollected thereon, and a like indifference appears to have been manifested by them in 1887, in regard to his duties during 1886.

Then what are the facts and circumstances, the non-disclosure of which amounts to such constructive fraud upon the part of the corporation as relieves the defendants from liability? There was not as in *Lee v. Jones*, 17 C. B. N. S. 482, such a partial statement of the facts as made that which was concealed or non-communicated a misrepresentation or untrue statement of what was disclosed. Nor was there the concealment by the corporation of any previous misconduct on the part of Watt unless his non-return of the 1885 roll can be called a concealment of a material fact amounting to fraud. The defendants must be assumed to know the law, and that the council had power to enlarge the time when deemed necessary for the return by the collector of the rolls, and they could have ascertained upon enquiry if the time had been so enlarged before executing the bond in October, 1886. It was not at that time (October, 1886) supposed that Watt had any moneys in his hands belonging to the corporation collected on the 1885 roll, but only that the taxes remained uncollected. See *The Guardians of the Stokesley Union v. Strother*, 22 L. T. 84.

Judgment.

MacMahon,
J.

Under the by-law appointing Watt collector he was required to pay over to the treasurer every week all moneys in his hands and collected by him as tax collector. In *Mayor of Durham v. Fowler*, 22 Q. B. D. 394, where there was a similar provision, it was held that the plaintiffs' acquiescence in the collectors' irregular mode of accounting was not such connivance as to discharge the sureties. And in the judgment the language of Lord Brougham in *Mactaggart v. Watson*, 3 Cl. & F. at p. 540, is: "Assuredly it is no argument against my being answerable for a man's not doing a certain thing that the party to whom I gave this obligation did not see that I did the thing. I had myself undertaken for his doing it, and it is no discharge of my voluntary obligation that the obligee did not see to his proceedings."

There will be a reference to the Master at Owen Sound under sec. 102 of the Judicature Act, and Rules 551 and 552 whose enquiry will extend to ascertaining the amount uncollected on the 1885 roll at the date the first bond was executed by the defendants on the 6th of October, 1886, and if any sum or sums collected by Watt on the rolls of 1886 or 1887 were paid over to the treasurer and applied on the roll for 1885. Also if any sums collected on the 1887 roll were applied on the roll for 1886. And in addition to report if the moneys collected on the rolls for 1886 and 1887 if paid on account of the 1885 roll were so paid with the knowledge of the plaintiffs.

To avoid any question, further directions and costs are reserved.

A. H. F. L.

[CHANCERY DIVISION.]

GORDON V. PROCTOR ET AL.

Estoppel—Execution creditor—Purchase of mortgage by—Denial of mortgagor's title—Fraudulent conveyance.

An execution creditor who purchases and takes a transfer of a mortgage of property is not estopped thereby from setting up in an action against him for the seizure of the same property under his execution against the grantor of the mortgage, that the said grantor was not the owner of the property in question and that the conveyance to the mortgagor by him was fraudulent and void as against the creditors of the latter.

THIS was an action for damages for trespass to lands, Statement. and removal and conversion of goods alleged to have taken place in October, 1888, and was brought by James Gordon, a farmer, against J. O. Proctor, the sheriff of the united counties of Northumberland and Durham, James Hagerman a bailiff, George Edmison a solicitor, and Christopher Leary, William Leary, and John Leary.

The defendants Proctor and Hagerman set up in their defence that William Leary and John Leary, in 1888, recovered a judgment in the Common Pleas Division against one Elizabeth Gordon, and on June 25th, 1888, by their solicitor, the defendant Edmison, issued writs of *fi. fa.* against goods thereon, and placed them in the defendant Proctor's hands with a direction to levy the amount, and gave positive instructions to seize the goods in question as being the goods of the said Elizabeth Gordon, which goods they accordingly seized and sold. And these defendants further alleged that they made the seizure by direction of Christopher Leary, who was assignee of William T. Fish of a certain chattel mortgage covering the said goods dated May 25th, 1888, made between the plaintiff as mortgagor and the said Fish as mortgagee, the assignment to Christopher Leary being dated October 16th, 1888.

The defendant, Christopher Leary, in his defence, also set up the chattel mortgage from the plaintiff to Fish of May 25th, 1888, and a mortgage of the lands in question

Statement. of the same date between the same parties, and that both of them were, in October, 1888, assigned to him; and that hearing that the defendant Proctor had made a levy on certain of the goods in question, he caused a seizure to be made of the remainder of them by virtue of the powers in the said chattel mortgage, and in doing so employed William Leary and John Leary as his agents or bailiffs.

The defendants William Leary and John Leary by their defence denied that the plaintiff was at the times mentioned in the statement of claim the owner of the lands and goods in question, and they set up their judgment referred to and the issue of writs of *fi. fa.* thereon, and the levy made thereunder; and that shortly prior to the said writs being placed in the sheriff's hands, and on or about May 25th, 1888, Elizabeth Gordon, executed a bill of sale of her goods to the plaintiff, and that the same was executed to defeat and defraud them; and that for the same purpose Elizabeth Gordon executed to the plaintiff a deed of the lands in question, the said conveyance being a mere device for the fraudulent purpose aforesaid. They further set up that acting under the instructions of Christopher Leary, a mortgagee of the goods, and of the lands in question, as his bailiffs they seized the goods, and they denied all wrongful acts.

The defence of the defendant Edmison was to the effect that he acted throughout merely as a solicitor, and in pursuance of his duty as such, and he claimed the benefit of the defences of his co-defendants the Learys.

In his replication, the plaintiff set up among other things that Christopher Leary and the other defendants claiming under him were estopped from denying his the plaintiff's title to the goods and chattels in question, by virtue of the said chattel mortgage whereby Christopher Leary claimed under him, the plaintiff, and shewed title by virtue of said mortgage in the plaintiff.

The remaining facts of the case sufficiently appear from the judgment.

The action was tried before MACMAHON, J., at the Argument-sizes at Cobourg, on October 30th, and November 2nd, 6th, and 7th, 1889.

Clute, for the plaintiff.

Osler, Q.C., and *J. W. Kerr*, for the defendants, Proctor and Hagerman.

Watson, for the defendants W. and J. Leary.

Riddell, for the defendants, Christopher Leary and Edmison.

The following cases were cited on the argument: *Peers and Pearson v. Carrall*, 19 U. C. R. 229; *Pickard v. Sears*, 6 A. & E. 469; *Beemer v. Oliver*, 3 O. R. 523; *Miller v. Hamlin*, 2 O. R. 103; *Gibbons v. Wilson*, 17 O. R. 290; Bigelow on Estoppel, 3rd ed., pp. 274, 289, 293-4; *Osgood v. Abbott*, 58 Maine 73; *Wiles v. Woodward*, 5 Ex. 557; *Lines v. Grange*, 12 U. C. R. 209; *Haight v. Munro*, 9 C. P. 462; *Kilbride v. Cameron*, 17 C. P. 373; *Hepburn v. Parke*, 6 O. R. 472; *Slater v. Oliver*, 7 O. R. 158; *Wakefield and Skelton v. Lynn*, 5 C. P. 410; *Carpenter v. Buller*, 8 M. & W. 209, 213; *Carter v. Carter*, 4 Jur. N. S. 63.

At the conclusion of the argument, the learned Judge gave judgment for the defendants, setting aside the deed and bill of sale, but reserved judgment as to the question of estoppel.

July 15th, 1890. MACMAHON, J.:—

Tried before me at Cobourg Assizes, without a jury, on October 30th, and the 2nd, 6th, and 7th of November.

At the conclusion of the case I gave judgment on the main question, holding that the conveyance of the lands from Elizabeth Gordon to James Gordon, dated the 25th May, 1888; and the bill of sale of the goods and chattels made by Elizabeth Gordon to the said James Gordon, bearing date the same day, were fraudulent and void, being made

Judgment. with intent to defeat the defendants, William Leary and
MacMahon, John Leary, and the other creditors of the said Elizabeth
J. Gordon.

That part of my judgment fully appears in the notes of the reporter.

In addition to the findings then made I find that a short time prior to the conveyance of the 25th of May it was in contemplation of Elizabeth Gordon to convey to her son William the lands and goods, and that intention was afterwards changed in favour of James.

As one Brewster was acting in the character, as he says, of agent for Mrs. Gordon in carrying out the arrangement between her and James, I find that he understood from all parties there was a difficulty, and that this judgment of Leary's was coming.

Then as to the question of estoppel. The argument is that the defendants Wm. Leary and John Leary having purchased the mortgages from Fish made by James Gordon, and procured an assignment thereof to be made by Fish to Christopher Leary as trustee for them, that by such purchase Wm. and J. Leary are estopped from setting up that James Gordon was not the owner of the goods in the chattel mortgage; or owner of the lands covered by the real estate mortgage.

I do not think purchasing Fish's interest in the mortgages and taking an assignment thereof creates an estoppel as between William and John Leary and James Gordon.

William and John Leary are not attacking the mortgages, for they admitted by taking an assignment of the mortgages, that they were valid securities to Fish, and valid subsisting incumbrances on the properties. I think as execution creditors of Elizabeth Gordon, that is the extent of the admission so made by them. The fact admitted, could not have been controverted. There was no misstatement on the faith of which another has acted and been injured.

Fish being a mortgagee for value, without notice of any fraud, it mattered not to him that it turned out that the

bill of sale and the conveyance of the lands from Elizabeth to James Gordon, was without consideration, and voluntary and fraudulent and void as against the creditors of the former. Under such a state of facts, William and John Leary could, as execution creditors of Elizabeth Gordon, have attacked the bill of sale and conveyance as being fraudulent and void as against them, and at the same time in their statement of claim have admitted the right and title of Fish as mortgagee; and if successful in establishing the invalidity of the bill of sale, they could claim that the equity of redemption, or whatever interest it might be called which Elizabeth Gordon had in the goods and lands, should be sold under their executions.

Judgment.
MacMahon,
J.

There is an admission made by William and John Leary in taking an assignment of the mortgages that Fish, as mortgagee, has a good title; and in an action for the purpose of impeaching the validity of the bill of sale and the conveyance of the realty from Elizabeth to James Gordon, an admission in the pleadings of the nature above indicated of the title of Fish as mortgagee is, in effect, an admission co-extensive with and of no greater effect than the admission made by purchasing Fish's mortgages.

"A grantee of land conveyed by an intestate with intent to defraud creditors, is not estopped by taking under the deed and acting upon it to object, as one of the creditors of the estate, that the deed was fraudulent:" Bigelow on Estoppel, 3rd ed., pp. 346-7; *Norton v. Norton*, 5 Cush. 524; *Green Bay and Mississippi Canal Co. v. Hewitt*, 62 Wis. 316, 327.

Where an assignment of goods was made in fraud of creditors, this, though void as against the creditors, was nevertheless held to pass the property in the goods as between parties thereto and strangers. And a sheriff claiming to seize on behalf of a judgment creditor is a stranger within the rule if he does not prove the legal authority under which he seized on behalf of such creditor. For such purpose in trespass for the seizure it is sufficient if he prove the writ: *Bessey v. Windham*, 6 Q. B. 166;

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Judgment. and see *Bowes v. Foster*, 2 H. & N. 779 ; *Taylor v. Bowers*,
MacMahon, 1 Q. B. D. 291, in which cases the assignor and assignees
J. of goods were in *pari delicto* as to the fraud intended to be perpetrated on creditors.

In the present case Christopher Leary the assignee of the mortgages given by James Gordon is not complaining of any act or trespass committed by the sheriff. It is James Gordon who is complaining of the trespass.

The legal title to the goods was in Christopher Leary as assignee of the Fish chattel mortgage, and the legal estate was also in him subject to the prior mortgage given thereon by Elizabeth Gordon, whose equity of redemption, assuming her conveyance to James was fraudulent as against creditors, is liable to the judgments of her creditors.

Supposing Elizabeth Gordon had conveyed property of the value of \$5,000 to James Gordon by conveyances fraudulent and void as against her creditors, and James Gordon had mortgaged the property so conveyed for \$1,000 to a mortgagee for value without notice, the creditors could attack the conveyance so made to James Gordon, and at the same time admit by the pleadings the right and title of the mortgagee and that the incumbrance so created was a valid incumbrance on the property, and yet succeed in defeating the conveyance by Elizabeth to James Gordon, and be entitled to recover any surplus after payment of the principal and interest due to the mortgagee.

Pickard v. Sears, 6 A. & E. 469, and other cases of that class were referred to by Mr. Clute as affording an example of estoppel governing the present case. In *Swan v. North British Australasian Co.*, 7 H. & N. 603, Baron Wilde, in his judgment said as to the question of estoppel, at p. 633 : "The rule of decision which I deduce from an examination of the various authorities is this : That if a man has wilfully made a false assertion calculated to lead others to act upon it, and they have done so to their prejudice, he is forbidden against them to deny that assertion." Or, as stated by Brett, J., in *Carr v. London and North Western*

R. W. Co., L. R. 16 C. P. 307, at p. 316: "If a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such a state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist."

Judgment.
MacMahon,
J.

William and John Leary, as already stated, made no false representation; or no representation of a state of facts as existing, which did not exist, or upon which any one acted to their detriment and so were damnified.

Beemer v. Oliver, 3 O. R. 523, was also referred to, but in that case, the plaintiff who brought his action to recover the land had, as a creditor of the insolvent's estate, accepted from the assignee thereof a dividend on his claim from the moneys arising out of the sale by the assignee to the defendants, as the plaintiff well knew, of the very lands so sought to be recovered.

Peers and Pearson v. Carrall, 19 U. C. R. 229, does not, I consider, make for the plaintiff in the present case. There was an execution in the sheriff's hands against the widow and devisee of a testator of whose estate the plaintiff and the widow were trustees, and while such execution was in force the plaintiffs, the other two trustees, took from her a mortgage on all the personal property for advances made by them to her. The sheriff afterwards seized under the writ and the two trustees forbade the sale, but it went on, and one of them bought the goods and took a bill of sale from the sheriff, against whom they brought an action for the seizure. And it was held that they were not estopped by having purchased at the sale, but that having taken the mortgage from the widow while the writ was in the sheriff's hands they could not allege that the goods were not then hers.

The present case is more like *Wakefield & Skelton v. Lynn*, 5 C. P. 410, where a debtor gave to his creditor a chattel mortgage on his goods and a confession of judgment to secure the amount; the debtor after the mortgage became

Judgment. due made an assignment for the benefit of creditors, and
MacMahon, the assignees took possession of the goods; the creditor
J. then put a *fi. fa.* in the sheriff's hands directing him to
make the amount of the debt out of the goods, &c. of the
judgment debtor. It was held that the fact of the creditor
having put an execution in the sheriff's hands at his
suit directing to levy of the goods mortgaged to him as
the goods of the debtor, did not estop him from setting up
his title under the chattel mortgage.

See also the judgment of Parke, B., *Carpenter v. Buller*,
8 M. & W. at p. 213.

In my judgment Wm. and John Leary were not estopped
by any of their acts from setting up the invalidity of the
bill of sale and conveyance from Elizabeth to James Gordon.

The foundation of the claim against the defendant
Christopher Leary, is a letter by his solicitors addressed to
the sheriff, informing him that in the event of his selling
under the *fi. fa.* at the suit of William and John Leary,
that no action would be brought against the sheriff by him
(Christopher Leary), as assignee of the Fish mortgage.

I found at the trial that the rights of the mortgagee and
his assignee had been accelerated by trading one of the
horses, and by killing two of the sheep. The disposal of
the potatoes was after the seizure.

The hay, grain, and growing crops on the land owned by
Elizabeth, and conveyed to James Gordon, are mentioned
as chattels in the bill of sale, and at the time of the seizure
in October had been harvested.

In this case there must be judgment for the defendants,
dismissing the action with costs.

A. H. F. L.

[COMMON PLEAS DIVISION.]

HAIG V. HAIG ET AL.

Limitation of actions—Partition—Tenants in common—Discontinuance by one and possession by the other.

Where by mutual arrangement between the plaintiff and his brother, two tenants in common of certain land sought to be partitioned in this action, the former discontinued possession, and the latter retained exclusive possession thereof, making extensive improvements and receiving the rents and profits for the statutory period of limitation, and the plaintiff removed to another lot, which they also held as tenants in common, he also retaining the possession, &c., thereof for the statutory period, the only apparent dispute between the parties being a claim which had been made by the plaintiff that it was agreed that an alleged excess in value of the lot taken by his brother should be accounted for:—*Held*, that the action could not be maintained, as a good title to the lot had been acquired under the Statute of Limitations, and that the evidence failed to establish the agreement to pay the alleged value; the remedy for which in any event was also barred.

THIS was an action tried before MACMAHON, J., without Statement.
a jury, at Cobourg, at the Autumn Assizes of 1889.

Riddell and Lynch, for the plaintiff.

Osler, Q. C., for the defendant, Mary Ann Haig.

Holland, for the infant defendants.

The action was commenced on the 8th May, 1889, for the partition of the south-half of lot 12 in the 2nd concession of the township of Seymour, and was brought by John Haig against Mary Ann Haig, the widow, and four infant children of his late brother Samuel Haig, who died on the 19th February, 1887, and to whose widow administration of his estate was granted on the 12th of March, 1887.

The land in question was purchased in April, 1864, the conveyance being taken to the plaintiff and Samuel Haig as tenants in common.

The plaintiff and his brother Samuel had been in occupation of this south-half of lot 12 from 1864, to about 1872, when the plaintiff, being about to marry, removed

Statement. to lot 10 in the 3rd concession of Seymour, of which he had remained in exclusive possession ever since.

According to the plaintiff's evidence, Samuel had built a house and barns on the lot in dispute, and the plaintiff had sold to his brother Samuel the brick with which the latter had built his house—the brick being made on lot 10 in the 3rd concession of the township of Seymour. That lot had also been purchased by the plaintiff and his brother Samuel, some seventeen years prior to this action being brought, they paying \$600 therefor, the conveyance being to them as tenants in common; and at the time this action was commenced the plaintiff had been in exclusive possession thereof for fifteen years.

The defence alleged that the plaintiff and his brother Samuel had, fifteen years prior to this action, agreed between themselves, that Samuel should be solely entitled to the land in question: that the plaintiff should have the said lot 10 in the 3rd concession, and that they had been severally in possession of said lands ever since: that Samuel Haig, regarding the land in dispute as having been allotted to him, made valuable permanent improvements, by the erection of buildings, and only one year before his death, built a brick dwelling house which cost about \$2,000; and that the improvements and buildings had increased the value of the land \$2,800.

The infant defendants by way of counter-claim, asked that the plaintiff be directed to execute a conveyance of the land to them. They also asked, in the event of there being a judgment for partition, that they be allowed the value of the buildings erected by their father, Samuel Haig.

The Statute of Limitations was also set up as a bar to the plaintiff's recovery.

The brothers had also purchased other lands known as the "Island Lots," as tenants in common, the last payment on which was made in April, 1882. This completed the purchase of all lands in which they were thus jointly interested; and the plaintiff stated that there was not to be

a division of the land between them until all land purchased in their joint names had been paid for. Statement.

Prior to the plaintiff entering into possession of lot 10, the brothers had been living together on the land in dispute, and had been working it for their joint benefit, but when the plaintiff left and took possession of lot 10, there was a division of the chattels and personal property, and during the subsequent fifteen years, they had, according to the plaintiff's evidence, ceased to do any business in common.

The learned Judge at the conclusion of the case reserved his decision and subsequently delivered the following judgment.

July 12, 1890. MACMAHON, J. :—

In considering the defence of the Statute of Limitations in actions of ejectment brought by one tenant in common against another, to recover a share of the estate, the rights of the parties frequently turned upon the question whether there was an ouster of the claimant by his co-tenant enabling the statute to run against the claimant.

In *Culley v. Taylerson*, 11 A. & E. 1008, Lord C. J. Denman, considered the question of what was evidence of ouster in actions of the above character under the common law, and what changes were effected by the statute 3 & 4 Wm. IV. ch. 27; and in giving the judgment of the Court, said, at p. 1014: "Generally speaking, one tenant in common cannot maintain an ejectment against another tenant in common, because the possession of one tenant in common is the possession of the other, and, to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But, where the claimant, tenant in common, has not been in the participation of the rents and profits for a considerable length of time, and other circumstances concur, the Judge will direct the jury to take into consideration whether they will presume that there has been an ouster: as to which, see the cases of

Judgment. *Doe ex d. Fishar v. Prosser*, 1 Cowp. 217; *Doe d. Hellingings v. Bird*, 11 East 49, and *Doe d. White v. Cuff*, 1 Camp. 173. And, if the jury find an ouster, then the right of the lessor of the plaintiff to an undivided share, will be decided exactly in the same way as if he had brought his ejectment for an entirety.”

**MacMahon,
J.**

The learned Lord Chief Justice then quotes the second section of the Act, (section 4 of our own Act) and says, at p. 1015:

“The effect of this section is to put an end to all questions and discussions, whether the possession of lands, &c., be adverse or not; and, if one party has been in actual possession for twenty years, whether adversely or not, the claimant, whose original right of entry accrued above twenty years before bringing the ejectment, is barred by this section.”

Then as to the effect of this section on tenants in common, the Judge proceeds: “If this had been the only parliamentary enactment, it would not have varied the right of one tenant in common from what it was at the common law, because, the possession of one tenant in common being the possession of the other tenant in common, the lessor of the plaintiff and the defendant were, in contemplation of law, in possession, and there would be no such thing as the lessor of the plaintiff either entering or having a right of entry, an entry or a right of entry into land supposing that the party is out of possession, but which is not the case of tenants in common, where all are in possession; but their rights would be to be determined by the rules of the common law.”

The 12th section of the Act, (11th section of our Act) is quoted in the judgment, and provides that the possession of one joint tenant, whether of the entirety or more than his share of the land for his own benefit, such possession shall not be deemed to have been the possession of any other person or persons entitled to share as tenants in common.

The Chief Justice then said, at p. 1017: “The first question arising upon this clause is, whether it extends to make the

possession of co-parceners, joint tenants, or tenants in common, separate possessions from the time when the Act came into operation, or whether it has relation back to all * * tenants in common, who have ever been such, from the first time of their being * * tenants in common.”

Judgment.
MacMahon,
J.

The judgment is, that from the language of the Act it has a relation back, and has the effect of making their possession separate from the time they first became tenants in common. It was held in that case that the possession of the lessor of the plaintiff and of those under whom he claimed, was a separate possession from that of the defendant, and those under whom he claimed; and that the plaintiff was entitled to succeed.

It was also held that the second section alone would leave the lessor of the plaintiff as he was at common law: that by the 2nd and 12th together, he was barred; but that by the 2nd, 12th and 15th taken together, he was restored to his right to recover. The 15th section having provided that when the possession or receipt of the profits of the land, or the receipt of the rent shall not, *at the time of the passing of the Act have been adverse to the right or title to the person claiming to be entitled thereto*, then such person, notwithstanding twenty years had expired, shall have five years from the passing of the Act, in which to make an entry or distress, or bring an action to recover such land.

That case was followed in *Doe d. Holt v. Horrocks*, 1 C. & K. 566, in holding that section 12 operates to make the possession of tenants in common a separate possession from the time they first became tenants in common, and not merely from the time of the passing of the statute 3 & 4 Wm. IV. ch. 27. See *Doe d. Daniel v. Woodroffe*, 2 H. L. 811, at p. 833, where the opinion of the Judges asked by the House of Lords is given, where they say, “There seems no doubt this statute has a relation back, and makes the possession of one co-parcener no longer the possession of the other.”

Under section 29 of the Limitation Act. R. S. O. (1877) ch. 108, since consolidated with section 4 [R. S. O. ch. 111

Judgment. sec. 4 (1887)], the same time was allowed to claim land or rent in equity as to make an entry or distress or to bring an action at law.
MacMahon, J.

Prior to the Judicature Act, (1881) the right to partition was an equitable one; but since the Judicature Act, that distinction has of course ceased to exist.

By section 5 of the Act, the right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued "where the person claiming such land or rent * * has, in respect of the estate or interest claimed, been in possession or in receipt of the profits of such land, * * and has, while entitled thereto, been dispossessed, or has discontinued such possession or receipt, than such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received."

The provisions of sec. 12 in the Imperial Act were held to apply not only to the case where one of several joint tenants has been in possession of the entirety of the whole of the lands held jointly, but also to the case where such tenant has been in possession of the entirety of any portion of such lands; and the words, "or more than his or their undivided share or shares of such land" apply as well to the case where one of several joint tenants has been in possession of more than his undivided share in any portion of the lands held jointly as to the case where he has been in possession of more than his undivided share of the whole of such lands: *Murphy v. Murphy*, 15 Ir. C. L. R. 205.

In *Shaw v. Shaw*, 8 C. P. 270, Draper, C. J. treats most lucidly the question as to what constitutes exclusive possession by one joint tenant as against the other. See also *Meyers v. Doyle*, 9 C. P. 371, a case where, as in the present, there was a division by mutual understanding, but no conveyance executed, each of the tenants in common taking possession of a certain piece of land. There is in that case a quotation from Sugden's Property Statutes,

2nd ed., at p. 66, as to the effect of sec. 12 of 3 & 4 Wm. IV. Judgment.
 ch. 7. See also *Kennedy v. Bateman*, 27 Gr. 380. MacMahon,

J.

In *Knapp on Partition*, at p. 87, it is said: "An entry upon and a possession of the whole of the land by one tenant in common as if it had been his exclusive individual property, and the receipt by him of the rents and profits thereof * * amounts to an actual ouster."

Denman, C. J., in *Culley v. Taylerson*, says that the statute put an end to all questions and discussions as to whether the possession of lands be adverse or not, and that the claimant whose original right of entry has accrued above twenty years (ten years now) before bringing his ejectment, is barred. And the 5th section of our Act makes the accrual of the right of entry, or to bring the action, to commence from the time of the dispossession or *discontinuance of possession* by the person claiming to be entitled to the estate, or an interest therein. See *Re Hobbs*, *Hobbs v. Wade*, 36 Ch. D. 553, and *Meyers v. Doyle*, 9 C. P. 371. See also the point as to possession by one tenant in common in relation to the Statute of Limitations as against the other tenant in common: *Knapp*, (ed. 1887), at pp. 87 and 453, and *Freeman on Partition*, (ed. 1882,) sec. 242.

There is evidence of statements made by Samuel Haig to Joseph Hopps to the effect that a division was not to take place until the Island property was paid for. And on another occasion saying he had offered the plaintiff \$500 as being the difference in value between the two places, but the plaintiff wanted \$1,000; and also that he (Samuel) had agreed with John to give the difference between the two places.

John McAulla gave evidence as to a conversation he had with Samuel Haigh the year prior to his death in reference to the 400 acres John and Samuel had purchased, and Samuel said they had not been divided up, nor would they until they got through with Francis & Co., from whom they bought the Island lots.

The Island lots were paid for in 1882, some four years before this conversation is said to have taken place.

Judgment.

MacMahon,
J.

Mary Jane Stearns had a conversation with Samuel the November before he died, when he stated he had been sorry a thousand times that he built the house until he had settled with John; but that he was going to settle with him.

Benjamin Hopps said that Samuel had stated they (he and John) had not divided the Island lots, and had not divided these two (lots 10 and 12) yet, because John wanted too much difference: that John wanted \$1,000 and he, Samuel, was willing to give \$600 or \$700.

The arrangement between the brothers, as detailed by the plaintiff himself in evidence, was that after he removed to lot 10 that lot was to be assessed in his name and the lot in dispute in Samuel's name; and that subsequent to that agreement the actual division took place, by which he (Samuel) was to become owner of one property and the plaintiff of the other. The plaintiff also said that the claim he was making was that his brother (Samuel) owed him some money, and that he was making no other claim. That his claim was the difference in the money values of the two lots.

I think it is reasonably clear that the actual partition took place about the time the plaintiff removed from the lot in dispute, Samuel to remain in possession of that lot as his own, and the plaintiff to consider lot 10 in the third concession as his. It may be, if there was any difference in the money values, such difference was to be thereafter adjusted, but the plaintiff did not say that at the time the arrangement was agreed upon any difference in value was supposed to exist. The partition thus made in fact was not effective because not made by deed. But there was a discontinuance of possession of the land in dispute by the plaintiff and an intention to leave the exclusive possession to Samuel, and that he (Samuel) should have the exclusive right to the profits, and the statute commenced to run from the date of such discontinuance, about year 1871: *Meyers v. Doyle*, 9 C. P. 371, and the other cases already cited.

During the period of such exclusive possession, Samuel had not only received the profits of the land, but regarding it as his own, had with the plaintiff's knowledge and assent that it should be so regarded, made extensive and costly improvement thereon, the benefit of which to a large extent the plaintiff must reap should a partition be ordered.

Judgment.
MacMahon,
J.

I find as a fact that the plaintiff discontinued possession of this land with the intention and design that Samuel should have the exclusive possession of the said lot as his own, and be in receipt of the profits for his exclusive benefit for fifteen years prior to Samuel's death; and that the plaintiff was to have the exclusive benefit and exclusive profits of lot 10 from the same time.

The plaintiff, in my view, entirely failed to make out a case for partition.

There is no evidence that there was any agreement between the plaintiff and his brother Samuel as to the difference in the values of the two properties; or that Samuel had agreed to pay the difference in such values. If there was an agreement at the time to pay the difference in the money values, any remedy therefor was barred long ago.

W. J. Bell, the assessor of Seymour, said he thought when the two lots, 10 and 12 were in a state of nature, lot 12 would exceed lot 10 in value about \$400; but that in 1887 he assessed lot 10 at \$3,400, and lot 12 at \$3,200.

Lot 10 had not been improved to the extent of lot 12, but the location of the plaintiff's lot was regarded as much more advantageous by some of the witnesses on account of the goodness of the roads and its closer proximity to the market and school house.

I think a reasonable inference from all the evidence, is that lot 12 was at the time the plaintiff discontinued possession, \$400 in excess of the value of lot 10; and I find that as a fact, in case it should be held that the plaintiff is entitled to recover the difference in the values of the two properties.

I direct that judgment be entered for the defendants, dismissing the plaintiff's action with costs.

The defendants' counter-claim is dismissed as agreed, without costs.

[CHANCERY DIVISION.]

MCLURE V. BLACK.

Crown lands—Patent to land—Locatee receipt—Fraudulent locatee—Statute of Limitations—R. S. O. 1887, ch. 24, sec. 16.

One through whom the plaintiff claimed obtained in 1855 from the Commissioner of Crown Lands a receipt on sale of a certain lot of land. In 1868, B., in whose possession this receipt was, handed it back to the Crown Lands office, and by means of fraud procured his own name to be substituted as purchaser in the books of the department; and he and those claiming under him, including the defendant, had remained in possession of the lot ever since. In 1872, the plaintiff, having learned of the imposition, applied to the department for redress. This application was pending and undisposed of by the Commissioner till March 14th, 1889, when it was ordered that the patent should issue to the defendant, but three months were allowed to the plaintiff to take proceedings in Court to establish his title; and within that time the plaintiff commenced this action for a declaration as to his right to the land:—

Held, affirming the decision of FERGUSON, J., that the plaintiff's right of action was not barred by any Statute of Limitation.

Per BOYD, C. The case might be likened to a matter litigated in the proper forum wherein no decision is given till after the lapse of years:—

Held, *per* FERGUSON, J., (ROBERTSON, J., dissenting), that even if the Statute of Limitations did commence to run against those under whom the plaintiff claimed, it ceased to do so on rescission of the sale and the substitution of B.'s name in 1868, because then all right to bring an action or make an entry on their part ceased.

Statement.

THIS was an action brought by Malcolm Henry McLure against Alexander Black, claiming a declaration that he was entitled to the east half of lot 31 in concession 3 of the township of Bruce, and to the patent thereof, subject to the rights of the Crown therein.

The contention of the parties and the facts of the case are set out in the judgments.

The action was tried at Walkerton, at the Spring Chancery Sittings, 1890, before Mr. Justice FERGUSON.

O'Connor, Q. C., for the plaintiff.

Robertson, for the defendant.

May 14th, 1890. FERGUSON, J. :—

Judgment.

Ferguson, J.

The plaintiff says that in the year 1854, one Malcolm McLure agreed with the Crown Lands Department of the then province of Upper Canada, to purchase the east half of lot number 31, in the 3rd concession of the township of Bruce, on terms then agreed upon, and then or shortly after, paid to the said Department through the Crown land agent for the county of Bruce, the first instalment of the purchase money thereof: that the said Malcolm McLure, shortly after such payment, placed one Neil Beaton upon the land, in charge thereof, to do the necessary settlement duties for and as the agent of the said Malcolm McLure, and he says that the necessary settlement duties were performed by the said Malcolm McLure and the said Neil Beaton on his behalf: that Malcolm McLure, on the 6th day of February, 1874, assigned all his right, title and interest of, in and to the said land to one M. L. McKinnon, who, on the 27th day of January, 1876, assigned to one Charles Wickham, who, on the 1st day of March, 1878, re-assigned to the said M. L. McKinnon; and that the said M. L. McKinnon, on the 29th day of February, 1888, assigned the same to the plaintiff, who then became and now is the owner of the land subject to the rights of the Crown and entitled to the Crown grant thereof: that the defendant claims to be entitled to the Crown patent of this land, pretending that the said Neil Beaton was the locatee of and entitled to the same, and not the said Malcolm McLure, and upon the ground that he, the defendant, is the assignee of the land through certain assignments or transfers of the pretended interest in the land of the said Neil Beaton: that the defendant has caused the several assignments through which he claims to be placed on record, in the books and office of the Crown Lands Department of the province of Ontario, where the same now are, and where they are a cloud upon the plaintiff's title to the land: that the said Department has refused to grant the

Judgment.
Ferguson, J. patent of the lands to the plaintiff, although he is entitled thereto for the reason that the defendant has filed as aforesaid his pretended claim, and has left all parties concerned to their remedies at law. The plaintiff for these reasons asks that the several assignments or transfers through which the defendant claims, may be set aside and the plaintiff declared entitled to the lands and to the patent thereof, subject to the rights of the Crown therein.

The defendant denies all the material statements of the plaintiff, and says that he is in actual occupation and possession of the lands in question : that Neil Beaton, named in the plaintiff's statement, was a brother-in-law of Malcolm McLure, also named in the plaintiff's statement, and at the time of the agreement for the purchase of the lands in question, resided in the town of Stratford in the county of Perth, where Malcolm McLure also then resided : that the said Neil Beaton, prior to or about the month of February, 1855, employed the said Malcolm McLure to take up for him and purchase from the Crown a lot of land in the township of Bruce, and furnished and provided the money to pay the first instalment required to be paid therefor, and that the said Malcolm McLure in pursuance of such agreement, proceeded to the county of Bruce and applied to the Crown land agent at Southampton to purchase the whole of the said lot 31, as agent for the said Neil Beaton, and to purchase a certain other lot for himself ; and that the said Neil Beaton afterwards, about the year 1855, on his own behalf and not as agent for Malcolm McLure, entered upon and took possession of the lands in question : that the said Neil Beaton, afterwards finding that the said Malcolm McLure had taken up the said lot 31 in his own name, applied to the Hon. the Commissioners of Crown Lands, about the year 1868, to have his name entered as the purchaser of the said lot, and furnished evidence upon which the Commissioner of Crown Lands was satisfied that the said Neil Beaton was the real purchaser of the lot, and the sale to the said Malcolm McLure was thereupon cancelled, and the said Neil Beaton was allowed

to purchase the land from the Crown and was substituted ^{Judgment.} as the purchaser thereof instead of the said Malcolm Mc-Ferguson, J. Lure : that the said Neil Beaton remained in possession of the lot till about the year 1870, when he executed an assignment or transfer of the lands in question to his nephew, one Donald Beaton, who thereupon entered into possession of the said lands and continued in the possession thereof until the year 1873, when he sold the said lands to the defendant for valuable consideration, and executed an assignment or transfer thereof to him : that he, the defendant, thereupon entered into possession of the lands and has been in possession and occupation thereof ever since till the commencement of this action, and has made payments to the Crown on account of the purchase money, and has made large improvements on the lands : that the said Malcolm McLure, shortly after he applied to purchase the lands as aforesaid, failed in business and left the province and went to the United States, where he resided for about fifteen years : that the said Neil Beaton and Donald Beaton, while they were in possession of the lands as aforesaid, and the defendant ever since he purchased the same, did the statute labour and paid the taxes rated and assessed against the lands : that the defendant applied to the Hon. the Commissioner of Crown Lands for the issue to him of a patent of the land in question of which the plaintiff had due notice, and that after hearing the evidence placed before him by the plaintiff and the defendant, the Hon. the Commissioner of Crown Lands made an order or ruling that on production of an assignment from one H. D. Cameron (to whom the defendant had assigned his interest in the lands), and on payment in full of the balance of the purchase money due the Crown thereon, a patent for the lands in question should issue to the defendant ; but that three months from the 24th day of March, 1889, should be allowed to the plaintiff to take proceedings in Court to establish his title.

The defendant then says that he has been in actual and undisturbed possession of the lands for over sixteen years,

Judgment. and he claims the benefit of the statute commonly known
Ferguson, J. as the Statute of Limitations.

The defendant also says that it was a condition upon which the lands were sold by the Crown that the purchaser should forthwith enter into actual possession and make certain improvements and continue in possession, otherwise his right to become the purchaser would become forfeited, and the Commissioner of Crown Lands entitled to cancel such sale; and that the said Malcolm McLure did not enter into possession of the lands, or make improvements thereon as required, and that thereby his right (if any) derived under his alleged purchase became forfeited.

The defendant claims that the Commissioner of Crown lands having on the evidence adduced before him become satisfied that the said Malcolm McLure had been guilty of a fraud and imposition, and having allowed Neil Beaton to become the purchaser, the claim of Malcolm McLure and of the plaintiff, if any they had to the lands in question, was barred.

The defendant also says that he has procured an assignment from the said H. D. Cameron, and that the assignments from Malcolm McLure to McKinnon, from McKinnon to Wickham, from Wickham back to McKinnon, and from McKinnon to the plaintiff, were all made without consideration and for the purpose of carrying out a voluntary gift from the said Malcolm McLure to the plaintiff, who was the adopted son of the said Malcolm McLure; and in order that the plaintiff, who is worthless, might carry on the present proceedings in his own name; and by way of counter-claim, the defendant claims that he may be declared entitled to a patent from the Crown of the lands in question.

The memorandum of the ruling in the Crown Lands Department is as follows: "Let the sale stand, that is, allowing the west half to Beaton, and the east half to Alexander Black, and in case of payment in full, withhold issue of patent for three calendar months from the date of

such payment, to allow any person concerned to institute Judgment proceedings before any Court to question the title as Ferguson, J. ordered."

On the margin of this ruling there is a clause respecting the assignment of the west half of the lot from Neil Beaton to Malcolm McLure, and a statement that the west half is patented.

This action was brought within the three calendar months allowed, and upon this record it comes before me for trial.

[The learned Judge then commented at length upon the evidence, arriving at the conclusion that the purchase was made, the first instalment of purchase money paid, and the settlement duties done as and substantially in the manner stated by the plaintiff's witnesses, and then continued as follows] :

Assuming then that Malcolm McLure was really an honest purchaser of this lot for himself which, I think, appears to be the fact, and that the change made by substituting the name Neil Beaton for his name as purchaser in February, 1868, is not binding upon him, has he lost his rights for or on account of any of the reasons assigned or relied on by the defence ?

There was no contract of hiring between Malcolm McLure and Neil Beaton. Beaton was let into possession upon the terms of his performing certain services upon the land, taking in recompense the profits of the land, and according to the authority : *Truesdell v. Cook*, 18 Gr. at p. 535, a *tenancy at will*, was created between the parties. Then the purchaser, Malcolm McLure, was in occupation by his tenant who did the required settlement duties ; he himself, that is, the purchaser, working each successive spring upon the place for several years immediately after the purchase, and by money afterwards aiding this tenant so as to enable him to get on upon the land, and pay debts incurred presumably for clearing, building, &c., upon the land. I am not prepared to say that this was not a sufficient compliance with the requirements in this respect of

Judgment. the conditions on which the sale to him was made. No
Ferguson, J. authority was referred to showing or tending to show the
contrary of this conclusion, nor was the point argued
further than being referred to in a general way.

As to the decision of the Department in changing the name of the purchaser being conclusive, I do not think the case at all like *Boulton v. Jeffrey*, 1 E. & A. 111 ; and besides, the very fact of the Crown giving time to the plaintiff to establish his alleged right at law, or rather in a Court of law, indicates as plainly as possible, I think, that the Crown does not consider or desire to say that that decision is conclusive. The case *Doe dem. Henderson v. Westover*, 1 E. & A. 465, seems to show that a purchaser from the Government of a clergy reserve lot upon which he had paid the first instalment and obtained a receipt, had the right to obtain possession against any one in occupation, the Crown being bound by the contract made with the first purchaser.

It was contended that the right now claimed by the plaintiff had been defeated by the operation of the Statute of Limitations. No case was referred to showing that before issue of the patent the statute would run. The effect of sections 16 and 17 of the Act of 1860, 23 Vict. ch. 2, sec. 20, seems, so far as it relates to the immediate subject, to be that the holder of a receipt for money received on the sale of public lands, so long as the sale to which the receipt relates is in force and not rescinded, may maintain suits at law or in equity against any wrong doer or trespasser. These provisions are continued in the revised statutes. They existed before the passing of the Act, 1860, in the Con. Stat. (C.), and provisions of a similar character are found in 16 Vict. cap. 159. The contention was that on the plaintiff's showing Malcolm McLure, through whom he claimed was the holder of such a receipt and could have sustained an action for the possession of the land, and that for this reason the statute had run against him. In a late case : *Day v. Day*, 17 A. R. 157, in the Court of Appeal, the learned Judges seemed to be of the opinion that the

Statute of Limitations did not apply before the issue of the patent of the lands. Two of the learned Judges expressed this view, and the other members of the Court do not seem to have disagreed. In that case, however, it could not, perhaps, be said that the party out of possession was the holder of such a receipt as above referred to, or any of the documents mentioned in the sections of the Act of 1860 before alluded to, and for this reason the case may have differed in this respect from the present case.

Judgment.
Ferguson, J.

Without deciding as to whether or not the statute in a case such as the present one would run, I think the defendant's contention is answered in this way: If the statute would run, it commenced to run one year after entry by the tenant at will, Beaton. Twenty years was then the period required. The right to bring an action or make an entry, assuming it to have existed, continued only while the sale was in force and not rescinded. The sale to which the receipt related was—at least so far as this right of action given by the statute had concern—virtually rescinded in 1868 by the substitution of Beaton's name as the purchaser of the lot, and never since has Malcolm McLure or any one claiming under him been in a position to say that he was the holder of a receipt, and entitled by force of the statute to maintain the action; so that at most, even assuming that the statute would apply to such a case only about twelve years ran when the law required twenty years—I do not think it a case in which it can be said that the statute having commenced to run continued to do so.

I do not see that it is a case in which Malcolm McLure or any one claiming under him could have relied upon an estoppel. A tenant going in under his landlord is bound to admit that the landlord had a title sufficient to enable him to create the tenancy, but he may show that the landlord's title has expired; and this, so far as the provisions of the statute enabling the holder of a receipt to sustain the action are concerned, if they do so enable him, could have been shown against Malcolm McLure or

Judgment. any one claiming under or through him at any time since
Ferguson, J. the substitution of the name of the purchaser in the
Department,—the rescission in fact of the sale to McLure.

I am of the opinion that in no view of the case can it be properly said that the right contended for by the plaintiff has been defeated by the operation of the Statute of Limitations. But I refrain from expressing an opinion as to whether or not the statute could, if the facts were different, be held to apply ; I do not see that it is necessary that I should do so. The statute does not run against the Crown, and it was ingeniously argued by Mr. O'Connor that to hold that the statute did run in a case such as the present, before the issue of the patent, would be virtually holding that it ran against the Crown because the right acquired by force of the statute would be, at all events, in a sense, a right against the Crown. I thought there was much force in the argument but, as I have said, I need not offer an opinion in respect to it. Then, I do not think it has been shown that there has been any *bond fide* purchase of this land without notice of McLure's claim so as to defeat the claim. When Donald Beaton took the assignment from Neil Beaton, he had gained knowledge of Malcolm McLure's claim. He had the knowledge of it in his mind, upon which he acted at the time of taking the assignment. He came to live with his uncle, Neil Beaton, to be his heir. When he learned (through report it is true) of Malcolm McLure's claim, he demanded wages which his uncle had never agreed to pay. The uncle had not the money or means of paying the wages demanded, and as a settlement, the assignment of this fifty acres took place. I think Donald Beaton took the assignment, running the risk of any claim that Malcolm McLure might make ; and he says he told the fact of McLure's claim, or the danger of it, to the defendant Black before the assignment to him, so that the defendant had notice ; and besides, the notes given by him as the consideration have not been paid, and are said to have been lost or destroyed. He has paid nothing. It is proved that he had notice, and he does not contradict the evidence as to this.

The various assignments mentioned in the pleadings were produced and their execution admitted, and, as documents executed and existing, in fact, they were not nor was any of them disputed. Judgment.

Assuming then that the decision of the Department in substituting the name of Neil Beaton as the purchaser, instead of that of Malcolm McLure, is not binding, and, for the reasons before stated, I do not see that it is now intended to be binding, I am of the opinion that the plaintiff succeeds in showing that he is, as between him and the defendant, entitled to the issue of the patent of this land in his favour, subject of course, to the payment of the balance, if any, of the purchase money, and to all other rights of the Crown in respect of the land, *and there may be a declaration to this effect.*

There was not evidence showing that the object of making the assignment mentioned in the 15th paragraph of the defence was as in that paragraph stated.

The judgment is for the plaintiff, and, after some hesitancy, I think, with costs.

The defendant now moved by way of appeal from the above judgment, and the motion came on for argument on June 26th, 1890, before BOYD, C., and ROBERTSON, J.

W. Cassels, Q. C., for the defendant. The defendant Black has a statutory title if the statute applies. From 1873 he has been in possession of the east half of the lot. This possession was adverse to the plaintiff, who had knowledge of the circumstances since 1872. I refer to *Yale v. Tollerton*, 13 Gr. 302. A locatee's interest is saleable under execution as well as assignable: *Ferguson v. Ferguson*, 16 Gr. 309; R. S. O. 1887, ch. 3, sec. 2, sub-sec. 1. Beaton being located in 1868, no right of entry was left in McLure. See also *Day v. Day*, 17 A. R. 157. The plaintiff has no *locus standi* to question the defendant's title.

O'Connor, Q. C., for the plaintiff. We were not in a

Argument.

position to bring an action of ejectment : R. S. O. 1887, ch. 24, sec. 15, gives no such right. The Crown had the right to deal with the land, and had the sole right to dispose of the land to anyone: *Truesdell v. Cook*, 18 Gr. 532. [ROBERTSON, J.—Do you mean that if the Crown issues a location ticket, and the locatee goes into possession, and is not in default, and the Crown then grants a patent to another person, the patentee can eject the locatee ?] I maintain that he could. Although the plaintiff might have had the right in equity to set aside the location ticket, he would have had to do so before he would have been in a position to bring his action of ejectment. Then, the Statute of Limitations does not run against anyone so long as the title is in the Crown : *Jamieson v. Hurker*, 18 U. C. R. 590 ; *Dowsett v. Cox*, *ib.* 594 ; *Day v. Day*, 17 A. R. 157. There is no case shewing the contrary. The Crown has not intended the Court to inquire into any question of the Statute of Limitations. [BOYD, C.—It all comes back to the question, whether the Crown will issue its patent to the person who the Court says is legally entitled or not].

September 4th, 1890. BOYD, C. :—

McLure became purchaser of the lot in question in 1855, and obtained the usual receipt on sale from the resident Crown Land agent. This receipt was in the possession of Neil Beaton, agent of the said McLure, and was by him handed over to the Crown Lands Department in 1868, when, by means of fraud, he procured his own name to be substituted as purchaser, in the books of the Department. This action of the Department was taken under 23 Vic. ch. 2, sec. 20 (the law then in force, and to be found in R. S. O. 1877, ch. 23, sec. 22). By that provision, the Commissioner of Crown Lands, if satisfied that any sale has been made in error or mistake, may cancel it—resume the land, and dispose of it as if no sale had ever been made. That was done compendiously in this case by erasing the name of the original and real purchaser and

substituting the name of the supplanter, as found by the learned Judge of first instance. McLure having learned of this imposition, applied to the department for redress in 1872, or about that time, and forthwith, upon his return from the United States, where he had been since 1863. This application, wherein were disclosed the facts now again proved before the learned Judge has been pending and undisposed of by the Commissioner of Crown Lands, from that time until the 14th of March, 1889, when it was ordered that the patent should issue to the defendant, allowing the plaintiff three months, however, to take proceedings in Court to establish his title. Upon this ruling and direction the present action is based.

Judgment.
Boyd, C.

The only point urged before us was as to the effect of the Statute of Limitations ; it being but faintly suggested that we should interfere on the findings of fact. In my opinion the statute does not apply to this case. The wrong doing to be redressed arose from the *ex parte* action of Beaton, and induced by the production of untrustworthy affidavits. By these means the Commissioner was led to make the cancellation of the sale to McLure, and it was the peculiar function of that same public officer to undo that wrong upon application being made for that purpose. Had the person deceived directly applied to the Courts without resorting to the Commissioner, he would probably have been told that it was his business first to apply to the Crown Lands Department. If, on application to the Department, he failed to satisfy the Commissioner, he would have had no appeal to the Courts, unless perhaps under exceptional circumstances, which do not exist here. If, as in the case in hand, relief was sought from the Commissioner, and that officer and his successors have been in doubt or in advisement whereby judgment has been reserved until the order already mentioned permitting a proceeding in the Courts, why should the delay be counted against the injured person ? This phase of the dispute may be likened to a matter litigated in the proper form wherein no decision is given till after the lapse of years—in such a case,

Judgment. pending judgment, the Statute of Limitations cannot
Boyd, C. operate to vest or divest rights, but must be deemed suspended.

In other words, the Courts do not interfere with the action of the Commissioner as a public executive officer in a *quasi*-judicial capacity, and in the absence of any statute giving larger jurisdiction, they act only when the rights of claimants before him are by him relegated to the decision of the judges. This principle is involved in the decision of *Boulton v. Jeffrey*, 1 E. & A. 111, and other cases following it.

I have not, however, to deal with a case where the injured person has abstained from making application for the restitution of his rights. It may be that here an option existed to apply to the Court or to the Commissioner. Having chosen the latter course, it must not be said that the applicant erred in casting himself upon "the infallible justice of the Crown." Though I am disposed to hold that cases may be put in which the Statute of Limitations runs, as against locatees and licensees of public lands prior to the issuing of the patent, and while the fee is still in the Crown, yet, in this case, it would be a perversion of the Act to let it prejudice one who had bestirred himself to assert his rights, and was awaiting the pleasure of the Crown.

The judgment should be affirmed with costs.

ROBERTSON, J. :—

The evidence warrants the findings of the learned Judge who tried the case, and the motion on the grounds in relation thereto must fail ; but the question as to whether the Statute of Limitations applies, is pressed ; and as the learned Judge did not dispose of that question, the defendant now urges that on that ground he is entitled to succeed.

This is not an action to recover possession of the land ; it is brought to try a question which, no doubt, involves

the recovery of the land, but the plaintiff, by his judgment in this action, cannot get a writ of possession ; if he ultimately succeeds he will be entitled to have a patent from the Crown, on his complying with the conditions on which the land was originally sold, which will entitle him to possession, or to maintain an action to recover such possession, and in that case, there is no doubt the defendant could not set up successfully a title to the land by reason of his having in himself and in those through whom he claims undisturbed possession since 1868, the time when Neil Beaton procured his name to be substituted for that of Malcolm McLure, as the purchaser of the lot from the Crown. Such a defence would be tantamount to asserting that the Crown had lost its title in fee, and the cases : *Jameson v. Harker*, 18 U.C. R. 590 ; *Dowsett v. Cox*, *ib.* 594; and *Day v. Day*, 17 A. R. 157, are authorities against that. And as I understand the defendant's contention, it is because of this possession that he now seeks to defeat the plaintiff in this action. Judgment.
Robertson, J.

I am of opinion that he cannot succeed in that way ; but, had nothing taken place to prevent the Statute of Limitations running against the cause of action, which to Malcolm McLure accrued, when Neil Beaton, by falsehood and fraud, induced the Commissioner of Crown Lands, in 1868, to substitute his name for that of Malcolm McLure, as purchaser, I am inclined to think the plaintiff would have some difficulty.

By R. S. O. 1887, ch. 24, sec. 16, a right of action is given to the holder of a " receipt for money received on the sale of public lands," so long as the sale or grant to which such receipt relates is in force and not rescinded, and the holder thereof may maintain suits in law or equity against any wrongdoer or trespasser, as effectually as he could do under a patent from the Crown, and the receipt would be *prima facie* evidence for the purpose of possession by such person or his assignee, &c. This provision has been in force since 16 Vic. ch. 159, of the old Province of Canada.

Now the facts, as found by FERGUSON, J., shew that

Judgment. **Malcolm McLure** on his return from the United States in **Robertson, J. 1872**, and as soon as he became aware of the fraud practised by **Beaton** on the Commissioner, applied to the Commissioner, under the 22nd section of the Public Lands Act, for restitution of his rights, and he filed an affidavit made by **Beaton** himself, stating in direct terms that he, **Beaton**, had no claim on the lot, but that **McLure**, was the rightful owner, under the Crown, of the same. Now **McLure** had two courses open to him ; he could have filed a bill in equity at the time, or brought an action, under the 16th section of the Act, above referred to, against **Beaton** as a wrongdoer, or trespasser. Or he could apply to the Commissioner under the 22nd section as above stated, and in my judgment either course was open to him and the Commissioner had full power and authority to dispose of the matter. He did take it into consideration, but did not dispose of it, although further evidence was received by him in 1874, when one **McKinnon**, had acquired all **Malcolm McLure's** interest and the matter was not finally disposed of by the Commissioner until March, 1889, when the present defendant made an application for the patent to issue to him. Then it was that the Commissioner ruled that on payment of the balance of the purchase money, and on producing an assignment from one **H. D. Cameron**, to whom defendant had assigned as collateral security, the patent should issue to defendant, but he ordered a stay for three months, to enable plaintiff to take proceedings in Court to establish his title.

Now I think plaintiff has a right to say that those through whom he claims took the necessary steps to set aside the sale to **Beaton**, within a time, which prevents the statute running against him ; and the fact of defendant and those through whom he claims, being in possession of the land, claiming as owner since 1868, does not militate against the plaintiff's cause of action. On the other hand had **Malcolm McLure** and the others under whom the plaintiff claims, slept on his and their rights, seeing as they did, and knowing as they did, that **Beaton** and the

defendant were in possession and claiming to be the purchaser as against him, I have no doubt, the cause of action given under the 16th section of the Public Lands Act, would have been barred, and the plaintiff would have lost his remedy and he must have been defeated in this action.

Judgment.
Robertson, J.

My learned brother Ferguson, however, is of opinion that McLure lost his right of action at the time the sale to him was cancelled, in 1868, and the name of Neil Beaton substituted for his as purchaser, for the reason that McLure was at that time without the necessary evidence under the 16th section of the Act, R. S. O. 1887, c. 24, to make out a case: that is, he had no receipt for the purchase money, nor did he appear as purchaser on the books in the Crown Lands Department. With the greatest deference I have come to a different conclusion. I can see no difficulty in McLure's way to make out a good case against Beaton, for the wrongful act committed by him. He, Beaton, was, from the time he succeeded in deceiving the Commissioner of Crown Lands, a wrongdoer, and a trespasser against McLure, and an action would lie against him at the suit of McLure, and the evidence to support it was to be obtained in the Crown Lands Department, and at the trial of this action the original receipt given to McLure by the Crown Lands agent for the first instalment, would be produced, which receipt gave him the right to maintain *prima facie* the action of course, subject to the order of cancellation, and the new receipt given to Beaton which, however, could be defeated on shewing the fraud practised on the Commissioner, as it was in this action. But I do not think McLure was of necessity obliged to take proceedings at law to maintain his rights; it was open to him to choose between that and an application to the Commissioner, under the 22nd section, and having adopted the latter in time to prevent the statute running against him, I think the defence of the Statute of Limitations in this action fails.

A. H. F. L.

[CHANCERY DIVISION.]

THE MUNICIPAL CORPORATION OF THE TOWN OF THOROLD
V. NEELON.

Company—Shares as collateral security—Liability to contribution—Bond fide holder of shares as fully paid up—Notice—Allowance of discount on shares—Resolution of directors to treat moneys received in part payment of a number of shares as full payment of a portion of the shares—Ultra vires.

The defendant, a director and shareholder of a railway company, lent \$100,000 to the company under a written agreement with the latter and his co-directors, that they would transfer to him fully paid up shares as security. They accordingly transferred to him as fully paid up a number of shares of the par value of \$50 each. Of these 75 shares were part of 187, which had been held by a shareholder who had paid \$3,750 upon his 187 shares. The directors resolved to treat this as payment in full of 75 shares, and they got the shareholder to transfer these 75 shares as fully paid up to the defendant :—

Held, in an action by an execution creditor with writs returned *nulla bona*, that this was *intra vires* of the company, and the 75 shares were held by the defendant as fully paid up.

As to the balance of the shares so transferred to the defendant, it appeared that a discount had been allowed upon them; but that the defendant had no notice or knowledge of this fact, and would not have accepted them had he not *bond fide* believed them to be fully paid up, as was represented to him by the directors of the company who transferred the same :—

Held, that in the defendant's hands these shares must be considered as fully paid up.

Statement.

THIS was an action brought by the Municipal Corporation of the town of Thorold as execution creditors of the St. Catharines and Niagara Central Railway Company, whose writs had been returned *nulla bona*, against Sylvester Neelon, Vice-President and a director of the company, claiming payment from him of the amount due on the executions, upon the ground that on or about December 1st, 1887, he procured to be transferred to him from his co-directors and one John Shields, 965 shares of the capital stock of the company to be held by him from the company upon the same terms and conditions as they held the same, and that there was a large amount unpaid in respect of these shares more than sufficient to satisfy the plaintiffs' claim.

The railway company was incorporated under and by virtue of an Ontario Act, 44 Vict. ch. 73, and amending Acts, and a Dominion Act, 50 & 51 Vict. ch. 60, and an amending Act, 51 Vict. ch. 78, and authorized to construct, equip, and operate a railway from Niagara Falls to Toronto. Statement.

The defendant by his defence denied that he held any such shares upon which there was any sum unpaid at the commencement of the action, and alleged that the shares in question were transferred to him under a written contract dated November 1st, 1887, whereby his co-directors and John Shields covenanted to transfer to him certain shares of fully paid up stock in the company as collateral security for the re-payment of certain moneys advanced by him to the company, and that the said shares were represented by the company and the transferors to be fully paid up shares, and were transferred to and accepted by him as such : that he did not agree to take or accept any shares except fully paid up shares, and would not have accepted the transfer of the said shares to him if he had not believed them to be fully paid up : that he was a purchaser of the said shares for value without notice that any sum was unpaid thereon, and was entitled to the protection usually accorded to such purchasers; and the defendant set up also other grounds of defence not necessary to mention here.

The plaintiffs replied and demurred, and set up that as a matter of fact the shares were not fully paid up, and the defendant on or about December 1st, 1887, accepted them with notice that they were not paid up, or at all events, without any reasonable ground for believing that they were paid up, and that no representations were made to the defendant as alleged. The grounds of demurrer are not material to the present report.

The action came on for trial at the Chancery Spring Sittings, 1890, at St. Catharines, before ROBERTSON, J., who afterwards gave judgment as follows :—

Judgment. May 17th, 1890. ROBERTSON, J.:—

Robertson, J.

This action was tried before me at the last Chancery Sittings at St. Catharines when I reserved judgment. I now find that the defendant received the shares of the capital stock of the railway company in the pleadings mentioned as collateral security only, and not as an absolute holder, for the repayment to him of the sum of \$100,000, which he agreed, under an agreement under seal between the said railway company, of the first part, and the president and directors of the company as individual stockholders of the second part, and one John Shields, another stockholder of the third part, and the defendant of the fourth part, referred to in the said pleadings, to advance to the company by way of loan to enable the company to go on with the construction of their railway, which amount I find the defendant has advanced to the company. I also find that according to the terms of the said agreement the said stock was to be paid up stock, and that the defendant received it believing and relying upon the representations of the proper officers of the company that the said stock was fully paid up at the time it was transferred to him. I also find that had there been any doubt in the mind of the defendant at the time the said stock was transferred to him, that the said stock was fully paid up, he would not have received the same, nor would he have made the advance of \$100,000, or any part thereof to the company. I also find that there never was any contract between the defendant and the railway company, or with the said parties of the second and third parts to the said agreement to take, accept, or receive the said stock or any part thereof, other than on the terms mentioned and set forth in the said agreement. And I give judgment for the defendant on the demurrer, and I dismiss this action with costs, and order judgment to be entered accordingly, but I stay further proceedings to enable the plaintiffs to appeal if they are so advised, until the next sittings of the Divisional Court. See

McCracken v. McIntyre, 1 S. C. R. 479; *Page v. Austin*, 10 ^{Judgment.} S. C. R. 132; *In re Western of Canada Oil Lands and Works Co.*, 1 Ch. D. 115. ^{Robertson, J.}

The plaintiffs now moved by way of appeal before the Chancery Divisional Court, and the motion came on for argument on June 9th, 1890, before BOYD, C. and FERGUSON, J.

It may be briefly stated here that as to 75 of the shares in question, these had been been part of a lot of 137 shares formerly owned by one David Blain, upon which \$3,750 had been paid by him. The directors of the company resolved to treat this \$3,750 as payment in full of 75 of the 137 shares, the par value of the shares being \$50 each, and then got Blain to transfer these 75 shares to the defendant as fully paid up shares in part compliance with the agreement with him, which the plaintiffs alleged was a transaction *ultra vires* of the company; and as to the balance of the shares in question the plaintiffs alleged that a discount had been allowed by the company upon them, and that the defendant knew this, and that the allowance of such discount was illegal.

Collier, for the plaintiff. The discount was not allowable, and Neelon was on the board and had access to the books before he took the stock and is not an innocent purchaser: *Sykes' Case*, L. R. 13 Eq. 255. In *Page v. Austin*, 10 S. C. R., at p. 149, *McIntyre v. McCracken*, 1 S. C. R. 149, is explained. [FERGUSON, J.—Neelon had notice of a certain transaction by which the company treated the stock as paid up stock.] As to the other 75 shares, the directors seem and have thought that they could treat these as paid up in full. A transfer was sent to Blain, who signed it and sent it back. We say Neelon took this stock subject to the same liability under which Blain held it. [FERGUSON, J.—A. is a subscriber for 100 shares, and pays 40 per cent. He goes back

Argument.

afterwards and says, I cannot pay up any more. I want the number of shares represented by the money I have paid. The directors say, "very well, it is best for you and best for us." Is that *ultra vires*? I think so. Then the other shares are affected by the discount given. I admit that *Burkinshaw v. Nicolls*, 3 App. Cas. 1004, seems to shew that if Neelon had bought innocently on the faith of representations by proper officers of the company that the shares were paid up, he could not be held liable. *In re London Celluloid Co.*, 39 Ch. D. 190, shews that *Burkinshaw v. Nicolls*, is only a ruling on a point of evidence; the company were held estopped from denying that the shares were paid up. In *Page v. Austin*, 10 S. C. R., at p. 155, Strong, J., deals with the law in such matters. The only questions are (1.) are the 75 shares paid up, and (2.) is the payment good as to the discounts. We say Neelon holds the 75 shares with only 40 per cent. paid upon them. The legal effect of what was done was giving back to Mr. Blain a portion of the capital of the company. [BOYD, C.—But the position of creditors is not affected. If the stock had all remained in Blain's hands he would have been liable to the same extent.] No. How could the company receive 100 per cent. on the balance of the shares? They could not single out an individual and make a call on him. *In re Almuda and Tirito Co.*, 38 Ch. D. 421, 425, is in point as shewing that no company can return to a shareholder any of the money he has paid. Blain might, after transferring the 75 shares, have transferred the balance of shares to a man of straw. It should be looked at in that light in judging of the legality. Inp. 43 Vict. ch. 19, sec. 3, may be referred to, shewing that special legislation was deemed necessary. I have not been able to find a case where a company has attempted to do any such thing. [FERGUSON, J.—Suppose a man holds 100 shares, he can, on a call being made, say, "I can pay on fifty shares only." He can do that?] I suppose he can when paying make such an appropriation. [FERGUSON, J.—But you say it is different when the money has been paid?

Then no such appropriation can be made.] No. The ^{Argument.} general body of shareholders, can declare shares in default to be forfeited. Now if what was done here was allowable the directors would be assuming to exercise a discretion, which is vested in the general body of the shareholders. I submit *McCracken v. McIntyre*, 1 S. C. R. 479, only applies where stock is originally issued as paid up stock, and therefore has no application to this case.

W. Cassels, Q. C., for the defendant. Neelon did not take stock as in the ordinary case from a shareholder. It is not open on a *sci. fa.* for a creditor to object on such grounds as here raised, even if it were such an ordinary case. It could only be gone into in a direct proceeding against the directors and the company as a breach of trust. The agreement of November 1st, 1887, is in aid of the company and in aid of the creditors. It is an agreement to which the company is a party of the first part, the directors being parties of the second part. The contract was that Neelon was to take paid up shares, and the company are parties to this agreement which recites that these are paid. When Neelon entered into a contract with the company to receive these paid up shares, he had no knowledge whatever of the discount being allowed, and his Lordship finds accordingly. He contracted then to get paid up stock. *The Sykes' Case*, L. R. 13 Eq. 255, has no application. But even if he had knowledge, and if the company did misconstrue these powers, it is not something that can be gone into in these proceedings. Then comes the only question, as to Blain's shares. No harm is done here. The creditor's position is just left where it was. Instead of Blain being liable for 60 per cent. on 100 shares, he is liable for 100 per cent. on 60 shares. Supposing for a moment the directors had not the right to re-appropriate—yet they did re-appropriate, they did it in furtherance of their contract. No shareholder has ever objected. Suppose a creditor took *sci. fa.* proceedings against Blain on the balance of the shares, how could the latter set up against

Argument. him "I've paid 40 per cent. on these shares" ? That is the test. The company could not now sue Neelon. [BOYD, C.—Yes, the question is, can a creditor be in any better position than the company ?] In *Page v. Austin*, 10 S. C. R., at p. 153, the law is stated. In *Waterhouse v. Jamieson*, L. R. 2 Sc. App. 29, the articles stated the shares were paid up, and the liability was confined strictly to the contract. In *Re Hall & Co. (Limited)* 37 Ch. D. 712, may be referred to. In every case where a shareholder has been made liable, the company could have held him liable.

Collier, in reply. Counsel has endeavoured to draw from *McCracken v. McIntyre*, 1 S. C. R. 479, the very conclusion which Strong, J., says in *Page v. Austin*, 10 S. C. R., at pp. 156-8, is not to be drawn. A creditor is in a better position than the company: *Re London Celluloid Co.*, 39 Ch. D., at p. 204.

September 4th, 1890. FERGUSON, J. :—

The learned Judge found that the defendant received the shares of the capital stock of the railway company as collateral security for the re-payment of the loan of \$100,000, upon the terms of the agreement of November 1st, 1887, which sum he, the defendant, advanced to the company by way of loan to enable the company to proceed with the construction of their railway. It is also found that according to the terms of the agreement the stock was to be paid up stock and that the defendant received it, believing and relying upon the representations of the proper officers of the company that the stock was fully paid up at the time it was transferred to him. The learned Judge also finds that had there been any doubt in the mind of the defendant at the time the stock was transferred to him that the stock was fully paid up he would not have accepted it, nor would he have advanced the \$100,000 or any part of it to the company. It is also found that there never was any contract to take or accept

this stock or any part of it other than on the terms of the agreement, and the action was dismissed with costs. Judgment.
Ferguson, J.

I have perused the evidence and the documents and consulted the authorities referred to by counsel as well as many others, and I do not quarrel with the findings of the learned Judge to which I have referred.

A person may, however, by mistake of fact or law accept shares which he believes to be, but which are not in fact fully paid up shares, and in such a case he may be liable in respect of the shares as shares not fully paid. See *Dent's Case*, L. R. 8 Ch. 768, referred to in Buckley on Joint Stock Companies, 5th ed., at p. 67. It is also stated that if the transferor had not a certificate from the proper officer of the company but the certificate issued for the first time to the transferee the principle of the case *Burkinshaw v. Nicolls*, 3 App. Cas. 1004, does not apply: Buckley on Joint Stock Companies, 5th ed. at p. 528, referring to *Vulcan Iron Works Co.*, W. N. 1885, p. 120.

In the argument before us two kinds of stock, or rather stock in two different positions accepted by the defendant were referred to and a contention held in regard to each. One of these was the 75 shares that had belonged to Mr. Blain and was transferred by him to the defendant under the circumstances that will be hereafter mentioned, the other was certain stock in respect of which a discount had been as was said, professedly but improperly made under the provisions of section 16 of ch. 73 of 44 Vict., (Ont.), the plaintiff contending that neither of these could in the hands of the defendant be considered as being fully paid up stock and that he the execution creditor of the company, having his writ returned as required, is entitled to recover against the defendant the amounts unpaid upon this stock to the extent of the amount of his claim in execution against the company. I will endeavour first to dispose of the matter in respect of the stock formerly held by Mr. Blain, the 75 shares.

What occurs to me after a perusal of all the evidence, is

Judgment. that the agreement of November 1st, 1887, was entered
Ferguson, J. into in perfectly good faith, for a good and laudable purpose, and was fully performed on his part by the defendant who advanced the \$100,000 to the company on the faith of it, although he says some small part of the money may have been advanced before the document was completed.

The stock mentioned in the schedule to the agreement, with many other things mentioned in the agreement, were given as security for the re-payment of this sum. The stock was all to be fully paid up stock, and all the evidence that bears upon the matter at all shews that the defendant refused from first to last to accept or take any stock that was not fully paid up.

As shewn by the schedule (and by the evidence) 168 shares of the stock belonged to or was to be assigned by Mr. Blain to the defendant, which stock, I think, he (Mr. Blain) got from Dr. Oille; but this, I suppose, is immaterial. He (Blain) had the stock and the liabilities of a shareholder in respect of it.

Shortly after the agreement unforeseen occurrences rendered Mr. Blain unable to pay the balance remaining unpaid upon or in respect of this stock. He had before, however, paid the sum of \$3,750. When these occurrences became known the parties concerned comprehended the situation, and seem to have been desirous of grappling with it; the company being very desirous that the work of their road should be progressed with as rapidly as possible, and for this it was necessary to have the money from the defendant.

In the evidence a good deal of discussion, by way of question and answer, is found as to the way in which the change, if it was a change, in regard to Mr. Blain's stock came or was brought about. I think a fair view of the evidence on this subject and a proper construction of it is that the company knowing that Mr. Blain could not then pay up in full, knowing that he had paid the \$3,750, and being aware that the defendant would not accept any but fully paid up stock, and possibly knowing or believing

that the defendant would not be or desire to be off his ^{Judgment.} agreement, by reason of his not getting the whole number ^{Ferguson, J.} of shares mentioned if what he should get were fully paid up shares, took the initiative and virtually proposed to Mr. Blain that the money he had paid should be applied in paying in full 75 shares of the stock, and that these should be transferred to the defendant under the agreement, instead of the 168 shares which he was not in a position to pay for in full; that the secretary of the company, under instructions from his board, sent to Mr. Blain to be signed a document transferring these 75 shares to the defendant; that Mr. Blain assented to this, and signed the transfer, which the defendant accepted, he taking the 75 shares as fully paid up shares and not otherwise, and believing that they were in fact fully paid up.

It appears that the defendant was a member of the board of directors, but did not act in the matters in which he was personally interested. He was, however, aware of the way in which the matter was conducted; that is, he had a sort of general knowledge of it, for in his evidence he says, in answer to a question, "I had considered that the directors of the railway company had applied the 40 per cent. on the 75 shares; had applied the 40 per cent. on the 187 shares to the 75 shares."

The defendant seems to have left the matter to the other directors and I think it appears beyond all reasonable doubt that he fully believed that the mode adopted would be effectual to constitute the 75 shares fully paid up shares and that he honestly accepted these shares under this belief and without thinking or seeking to have any advantage of any creditor or any one else, and believing that he incurred no responsibility whatever in respect of unpaid calls or claims of creditors of the company.

Mr. Blain, the transferor of the shares to the defendant, had not a certificate stating that they were fully paid up shares. So far as has been made to appear the books of the company did not show that they were fully paid up

Judgment. shares. But there can be no doubt, I think, that the
Ferguson, J. defendant was assured by the proper officer of the company that the shares were fully paid up, and the document of transfer was as I understand handed to him by the secretary as a transfer of fully paid up shares (he, the secretary, having sent it for execution and received it back) and this in part performance of the agreement by which he was to have fully paid up shares, and none others. Yet the defendant must I think be considered as affected with notice of what the actual facts were, and the question seems to me to be. *Were these fully paid up shares?* The answer to this question depends upon the powers of the company being sufficient to enable them to make such a transaction with a subscriber for stock, both they and the subscriber being willing, for Mr. Blain gladly acquiesced in the proposal of the company, and transferred the stock as desired; and if the act done was not a thing beyond the powers of the company I see no good reason why it should not be held to be valid and binding upon all persons concerned. I do not see that the transaction embraced any iniquity or anything illegal or wrong if there was the power on the part of the company to make it, and I do not see that it had the effect of derogating from the rights of any creditor or creditors of the company. Mr. Blain's liability remained for the same amount as before this transaction. What the creditor really complains of is that he is not permitted to gain an accidental advantage by making his claim against a man of wealth rather than against one, who, however high his financial standing had been, was, and I suppose is, more or less embarrassed by reason of the occurrences before alluded to.

We were not referred to any authority or case showing or going show that the company did not possess this power, and I do not perceive any good reason for holding that they had not the power.

It is to be observed too that this \$3,750 appears to have been paid in one lump sum, and is credited to Mr. Blain in the books of the company, under date March 14th, 1887,

in this way, "By cash paid on stock, \$3,750," and there ^{Judgment.} is nothing before us to show that this was in response ^{Ferguson, J.} to calls made by the company, or that it was specifically appropriated to stock further than an inference that may be drawn that the meaning was that it was to be applied upon the stock that Mr. Blain had, and in such circumstances it would seem strange if he and the company could not agree upon the appropriation of the money, especially when the effect of their so doing was not injurious to any one interested in the matter. And I am of the opinion that these 75 shares must be considered as in fact fully paid up stock.

Then as to the other stock, that in respect of which the discount was allowed professedly under the provisions of the 16th section of the charter of incorporation of the company. I do not think I need consider whether this discount was properly allowed the shareholders or not, for the evidence is that the defendant did not know any of the transactions or matters of the allowance of it, and the proper officers of the company represented to him that the stock was fully paid up, and it was assigned to and accepted by him under the surroundings before referred to as fully paid up stock. The defendant says he was not in fact aware of these discounts being allowed, and if he had been aware of it he would have claimed discounts in respect of some of his own stock which he did not do. I am of the opinion that this stock, too, must be considered in the hands of the defendant as in fact fully paid up stock. The conclusion then is that the plaintiffs' case fails and the judgment should be affirmed with costs.

BOYD, C., concurred.

A. H. F. L.

[CHANCERY DIVISION.]

STILLIWAY V. THE CORPORATION OF THE CITY OF TORONTO.

Municipal corporations—Action of negligence—Adding third party as defendant under R. S. O. 1887, ch. 184, sec. 531, sub-sec. 4—Proper order of addressing the jury.

An action for damages for injuries resulting from a defective sidewalk was brought against a city, who, under R. S. O. 1887, ch. 184, sec. 531, sub-sec. 4, obtained an order adding O. as a party defendant, and alleged in their defence that O. was responsible for the defects in the sidewalk, and asked a remedy over against him. O. delivered a defence denying the cause of action, and alleging that, if any accident occurred, it was through the neglect of the city. At the trial the jury found that O. occasioned the accident, and gave damages to the plaintiff. The plaintiffs then applied for leave to amend their statement of claim by claiming directly against O., which leave was granted, and judgment was entered against O. for the damages awarded :—

Held, affirming the decision of MACMAHON, J., that the leave to amend was properly granted, and the judgment should be affirmed.

Per BOYD, C. Modern procedure endeavours to work out the rights and liabilities of all parties as far as possible in the same action, and so long as no substantial injustice is done it is permissible to conform the pleadings to the facts at the close of the case.

At the trial the Judge ruled that counsel for O. should address the jury, before counsel for the city, thus giving the latter the reply as against O.:—

Held, that this ruling was correct.

Per ROBERTSON, J. As regards the city and O., the former stood in the relation of plaintiff, and under these circumstances, evidence having been given by O., to shew that the injury complained of was not caused by his negligence, but by the negligence of the city, the latter had the right to address the jury in reply.

Statement.

THIS was an action brought by James W. Stilliway and Esther Caroline Stilliway, his wife, against the corporation of the City of Toronto, claiming damages for injuries received by the female plaintiff through falling into a hole in the sidewalk in Queen street in Toronto, which hole, they alleged, had by the negligence of the corporation been allowed to remain uncovered and unprotected, and a source of danger to foot passengers for a considerable length of time.

The writ in the action was issued on December 11th, 1889. On February 10th, 1890, before delivering their statement of defence the corporation obtained an order in

Chambers, under R. S. O. 1887, ch. 184, sec. 531,* making Statement. Dr. Ogden a party defendant, and afterwards in their statement of defence alleged that if any excavation or opening existed in the sidewalk in question at the time of the alleged damage to the plaintiffs, the same was placed, made, left and maintained by Dr. Ogden (in front of whose property it was), without any permission of or notice to them; and they submitted, in their said statement of defence, that if the Court should hold at the trial that they were liable to the plaintiffs, then that they should have judgment over against Ogden for such amount as might be recovered by the plaintiffs from them, together with their costs.

Ogden also delivered a statement of defence denying the plaintiffs' cause of action, and alleging that if any accident did occur it was through the neglect and default of the corporation, who and not himself were in possession of the street at the time, and also alleging contributory negligence on the part of the female plaintiff.

* R. S. O., 1887, ch. 184, sec. 531, subs. 4: In case an action is brought against a municipal corporation to recover damages sustained by reason of any obstruction, excavation, or opening in a public highway, street, or bridge placed, made, left, or maintained by another corporation, or by any person other than a servant or agent of the municipal corporation, the last mentioned corporation shall have a remedy over against the other corporation or person for, and may enforce payment accordingly of the damages and costs, if any, which the plaintiff in the action may recover against the municipal corporation; provided nevertheless that the municipal corporation shall only be entitled to the said remedy over if the other corporation or person shall be or be made a party to the action, and if it shall be established in the action as against the other corporation or person that the damages were sustained by reason of an obstruction, excavation, or opening as aforesaid placed, made, left or maintained by the other corporation or person; and the municipal corporation may in such action have the other corporation or person added as a party defendant or third party for the purposes hereof if the same is not already a defendant in the action jointly with the municipal corporation, and the other corporation or person may defend such action as well against the plaintiff's claim as against the claim of the municipal corporation to a remedy over; and the Court or Judge upon the trial of the action may order costs to be paid by or to any of the parties thereto, or in respect of any claim set up therein as in other cases.

Statement.

The action was tried on April 8th and 9th, 1890, at the Toronto Spring Assizes before MACMAHON, J., and a jury; who found as stated in the judgment of ROBERTSON, J., and gave a verdict of \$250 for the female plaintiff, and \$150 for her husband.

After verdict the plaintiffs asked and obtained leave to amend their statement of claim by claiming directly against Ogden; and the learned Judge ordered that judgment be entered for the amount of the above damages, and full costs of suit against Ogden, and that judgment be entered for the city of Toronto dismissing the plaintiffs' action with costs.

On June 13th, 1890, the defendant Ogden moved by way of appeal on grounds set out in the judgment of ROBERTSON, J., and by order of the Court, the motion was re-argued on June 26th, 1890, before BOYD, C., and ROBERTSON, J.

J. K. Kerr, Q.C., for the defendant Ogden. The city must have known of the openings though not set forth in the plans, and they acquiesced in what was done. The areas became exposed through the barricades being removed, which was done by direction of the city. The sidewalk being up was one of the elements of negligence, and this was not done by Dr. Ogden. Farquhar was the city contractor to lay down the pavement, and part of his contract was to take up the sidewalk. The question is when did the contractor begin his work, because the city was then liable for the condition of the area. The only question that should have been left to the jury was whether Ogden was liable over to the city; the action was not against Dr. Ogden as primarily liable. Dr. Ogden is attacked on one hand by the plaintiff, and on the other by the city. I refer to *Duck v. Corporation of the City of Toronto*, 5 O. R. 295; *Dillon on Municipal Corporations*, 4th ed., secs. 1027, 1032, 1059.

Miller, Q.C., for the plaintiffs. No amendment was applied for till after the verdict. Dr. Ogden got the benefit of a long defence, and the case was thoroughly fought out

in every aspect of liability. If the sidewalk was taken up Argument.
the area hole should have been filled in or covered up by Dr. Ogden. Parties when once before the Court can be dealt with individually. As to the liability of Dr. Ogden directly: see Pollock on Torts, p. 325; *Vars v. Grand Trunk R. W. Co. of Canada*, 23 C. P. 143; *Harris v. Mobbs*, 3 Ex. D. 268, 271; *Fritz v. Hobson*, 14 Ch. D. 542, 554; *Whiteley v. Pepper*, 2 Q. B. D. 276; *Smith v. City of Leavenworth*, 15 Kans. 63; *Severin v. Eddy*, 52 Illinois 189.

September 4th, 1890. ROBERTSON, J.:—

This is a motion on behalf of the defendant Ogden by way of appeal from that portion of the direction for judgment made on April 19th, 1890, by the Hon. Mr. Justice McMahon, whereby he directed judgment to be entered for the plaintiff James Stilliway against the defendant Ogden for \$150, and for the plaintiff Esther Stilliway against the defendant Ogden for \$250, with full costs, and for an order to set aside the said portion of the direction for judgment, and to dismiss the action against the defendant Ogden, and for an order setting aside the findings of the jury against Ogden as set out in the answers to the first, second, and third questions, or some of them, or directing a new trial, &c.: and for an order setting aside the order amending the pleadings made on 10th April, 1890: On the ground:

1. That the said verdict and judgment is contrary to law and evidence and against the weight of evidence,

2. That upon the pleadings herein the plaintiffs having failed as against the defendants the corporation of the city of Toronto, should not succeed against the defendant Ogden, as the defendant Ogden was made a party at the instance of the corporation, for the purpose only of indemnifying the said corporation, and the plaintiffs did not at any time at or prior to the trial seek to make the defendant Ogden directly liable to them.

3. That upon the evidence the defendant Ogden was not, and is not liable to the plaintiffs, and the findings of the jury are contrary to the evidence and the weight of evidence.

4. The said order amending was applied for and obtained *ex parte* after the trial of the said action, and after verdict, and no copy thereof was at any time served upon the defendant Ogden, and the said defendant Ogden at the time of motion for judgment herein was not aware that such order

Judgment. had been applied for or made or that the pleadings had been amended accordingly.

Robertson, J. 5. The said application for an order to amend should not have been made *ex parte*.

The defendant Ogden also complained at the bar, that he had been placed in a false position at the trial, by the ruling of the learned Judge, requiring him to address the jury before the counsel for the city of Toronto, thereby giving the counsel for the city the reply as against him.

I will deal with this objection first. Before the Judicature Act, this action would have been, as it was, properly brought against the city, it being incumbent on the corporation to keep and maintain the public streets within the municipality in good repair, so as not to endanger the citizens passing and repassing on, over, and along the same; and in case of a verdict passing against the city, the corporation might then maintain an action against the party, who as between the corporation and him, was liable for the defect in the highway, whereby the corporation was made to suffer, &c. But now, this circuitous way of proceeding is obviated by the Judicature Act allowing the city to apply to make the real offender a party to the action. An order was made in due form, adding the defendant Ogden on these grounds, and the action went down to trial against both. So that as regards the city and the defendant Ogden, the former stood in the relation of plaintiff, and under these circumstances evidence having been given by the defendant to shew that the injury complained of was not caused by his negligence, but by the negligence of the corporation, the latter had the right to address the jury in reply. I think, therefore, the ruling of the learned Judge was correct.

The questions put to and answered by the jury were as follows :

1. Was the area opening where the accident to Mrs. Stillway happened left sufficiently protected on the evening of the 19th of October? No.

2. If not left sufficiently protected, by whom was it left unprotected? Dr. Ogden.

3. If you find the area opening was left insufficiently protected in what manner was the protection defective? The pole and board were not enough to cover the area.

4. If you find the area was left sufficiently protected on that evening, Judgment.
had the protection or any part thereof been removed prior to the accident? Robertson, J.
5. By whom was the old sidewalk removed from the front of Dr. Ogden's building? We do not know.
6. Did Farquhar commence his contract by removing the old sidewalk prior to receiving the permit of the 22nd of October? We do not think so.
7. If you find Farquhar commenced his contract prior to that date, on what day did he commence, and what had been done under it?
8. If you find he commenced work on his contract prior to the 19th of October, had the corporation of Toronto notice of his having so commenced?
9. Was the corporation of Toronto aware on the 19th of October or prior thereto that the said area opening existed and was unprotected? No.
10. If you find the city of Toronto was not aware as in the last question, had the said opening been left unprotected for a reasonable length of time to have enabled the city to have acquired notice of its unprotected condition?
11. What damages do you consider; first, Mrs. Stilliway entitled to? \$250; second, what is Mr. Stilliway entitled to recover? \$150.

As to the first ground taken. I have carefully read the evidence, and I have come to the conclusion that the jury had ample reasons presented to them whereby to find as they have. The attempt to fix the liability on the city, through the contractor Farquhar, I think completely failed; in fact there was not a tittle of evidence to shew that the contractor had in any way interfered with the sidewalk until after the accident which took place on October 19th; apart from the sworn testimony of the contractor himself, the documentary evidence shewed that it was not until three days after the accident that he could have interfered with the sidewalk, or commenced to work on his contract. All parties seemed to be oblivious as to who removed the barricade, as it was called, on the sidewalk in front of Dr. Ogden's buildings, and as to the sidewalk being removed, no one could say who removed it; the jury therefore could not in the face of the evidence have come to any other conclusion.

As to the second ground, I think there is nothing in it; the jury had to say who was guilty of the negligence complained of; they found in express terms that it was Dr. Ogden. How could the learned Judge under such circum-

Judgment. stances order judgment to be entered against the city? If
Robertson, J. there is anything in the objection taken as to the city
being primarily liable, the object of the amendment in
proceedings, worked by the Judicature Act, would be
frustrated. The order for judgment was therefore in my
opinion the only one that could be made.

As to the third ground I have dealt with that in reviewing the first ground. According to the evidence Dr. Ogden was primarily liable, and the action would have been well conceived if it had been brought against him only in the first instance.

As to the fourth and fifth grounds, there is nothing to warrant the Court interfering. I think, therefore, the appeal should be dismissed with costs.

BOYD, C. :—

The evidence shews that when Dr. Ogden obtained permission to build from the city, plans were submitted which did not shew the basement. The city were not aware of the work afterwards done for Dr. Ogden by which excavations were made upon the street line (encroaching nearly three feet) for the purpose of areas for basement windows. There is evidence that during construction of the building the sidewalk in front was broken off or cut off in different places by the workmen, and these openings were filled in part with clay. The builders were instructed to protect these areas, but the accident happened because of their being insufficiently protected. The jury have found that the city was not aware that these openings existed, and were unprotected prior to the date of the accident, and they have found that Dr. Ogden failed to leave them properly protected. Upon the evidence it was open for the jury to find as they did, and upon the findings which cannot be said to be against the weight of evidence the judgment is rightly entered against Dr. Ogden.

The only matter which gives hesitation is that the action was brought at first against the city alone, and at their

instance Dr. Ogden was added as a defendant pursuant to the provisions of the Municipal Act, sec. 531, sub-sec. 4. That section provides that the person so added may defend the action as well against the plaintiff's claim as against the claim of the corporation to have a remedy over. Here the defendant Dr. Ogden made as full a defence on the record and at the trial as if he had been originally a joint defendant, which this section also contemplates. The objection which at first appeared to me formidable that the city escapes, and he alone remains liable, does not now seem to me much more than a matter of form, having regard to this section, and the provisions of the Judicature Act. Modern procedure endeavours to work out the rights and liabilities of all parties as far as possible in the same action and so long as no substantial injustice is done it is permissible to conform the pleadings to the facts at the close of the fight. In this case the defendant Dr. Ogden knew that he was added for the purpose of making him ultimately liable, and though this claim was at first preferred by the city, and is at the last maintained by the plaintiff, yet the difference to him is not material, assuming that he is the party who is primarily responsible. The Act contemplates making the corporation and the person who does the actual injury joint defendants; had this been done by the plaintiff I do not see that the conduct of the case would have been practically or in form different from what is found in the record of this trial. See *Ecklin v. Little*, 34 Sol. J. 546.

Judgment.
Boyd, C.

Another objection which appeared to me of moment when first presented is now so explained by the actual transaction as not to be a violation of the ordinary rules of practice. It does not appear that the application to amend was *ex parte*; it was made after verdict rendered, and while all the counsel and solicitors were present, except the chief counsel for Dr. Ogden, who had been called away. There was clearly no intention on the part of the plaintiffs to take any undue advantage of the defendant, and after hearing the whole case and considering all the evidence it does not appear to me that the trial Judge exercised his

Judgment. discretion in allowing the amendment of the pleadings in such a manner as is reviewable on appeal.
Boyd, C.

As to the direct liability of the defendant to this action there is no doubt, as the hole dug by the defendant Dr. Ogden on the side of the highway occasioned a particular injury to the plaintiff: Pollock on Torts, 326; *Vars v. Grand Trunk R. W. Co. of Canada*, 23 C. P. 143; *Harris v. Mobbs*, L. R. 3 Exch. at p. 271; *Fritz v. Hobson*, 14 Ch. D. 542; *Clark v. Chambers*, 3 Q. B. D. 327.

The result is that the verdict and judgment should be upheld, and with costs of this application.

A. H. F. L.

[CHANCERY DIVISION.]

RE COLLINGWOOD DRY DOCK SHIP BUILDING AND
FOUNDRY COMPANY.

WEDDELL'S CASE.

Company—Contributory—Petition for incorporation—Statement as to shares therein—Estoppel—R. S. O. 1887, ch. 157.

Where in winding up proceedings it appeared that an alleged contributory joined in the petition for incorporation, wherein it was untrue stated that he had taken 250 shares of the capital stock, whereas the shares he held had, after incorporation, been voted to him by a resolution of the directors as paid up stock, for services in connection with the formation of the company :—

Held, that in view of the provisions of the Ontario Joint Stock Companies' Letters Patent Act, he was liable to be held a contributory in respect of, at the least, the number of shares voted to him.

Semle. He was liable for the full number of shares mentioned in the petition.

THIS was an appeal from the certificate of Mr. Cartwright, official referee in the winding-up proceedings of the above company, whereby he placed one Weddell on the list of contributories in respect to fifty shares of stock for \$5000.

It appeared that Weddell had done much service in connection with the formation of the company, under an understanding with the promoters, confirmed subsequently to incorporation by a resolution of the directors, whereby he was to be paid for such services in paid up stock, and the ground of appeal was that the stock in question was paid up stock, and that there was no liability to contribute in respect to it.

The company was incorporated under the Ontario Joint Stock Companies Letters Patent Act, R.S.O. 1887. ch. 157.

The judgment sufficiently sets out the facts of the case.

The appeal came up for argument on May 8th, 1890.

W. H. P. Clement, for Weddell, the appellant. The question of what is the amount unpaid must be settled by

Argument.

reference to the Ontario Act, R. S. O. 1887, ch. 157. In that Act there is no section corresponding with section 27 of the R. S. C. ch. 119, or with the like section 25 of the English Act of 1867, Imp. 30-31 Vict. ch. 131. These sections speak of a payment in cash, and therefore the cases under these Acts are not applicable. Under the Ontario Act payment otherwise than cash is contemplated, which was the case in England prior to the Act of 1867. Section 7 of the Ontario Act shews payment not by cash to be contemplated. There are no Canadian authorities as to what is payment under the Act. We therefore fall back on the cases in England before 1867, under the Act of 1862, Imp. 25-26 Vict. c. 89, of which I cite, on the general question of payment in money's worth, *Drummond's Case*, L. R. 4 Ch. 772, in which all earlier cases are cited; *Pell's Case*, L. R. 5 Ch. 11; *Re Baglan Hall Colliery Co.*, *ib.* 346; *Jones's Case*, L. R. 6 Ch. 48; *Pellatt's Case*, L. R. 2 Ch. 527. In the last case a transaction of this kind was considered perfectly legitimate. *Spargo's Case*, L. R. 8 Ch. 407, is a case since the Act of 1867, and under it even, I think I could have supported this appeal. It shews that there is no necessity for payment in cash to be made to the party for services and payment back of the sum by him to the company for the stock. There the appellant subscribed for fifty shares and paid for them by his services.

J. M. Clark, for the liquidator, contra. The company had no power to diminish the capital stock: *Re Almada and Tirito Co.*, 33 Ch. D. 415. The directors had no authority whatever to do so by resolution. That point is discussed at length and the authorities commented on in Brice on Ultra Vires, 2nd ed., pp. 355, and 829, and there is also a discussion at pp. 609, 610. I refer also to *Richmond's Case*, 4 K. & J. 305, 325. Then *Sykes' Case*, L. R. 13 Eq. 255, discusses the question of directors dealing in this way; also *Hay's Case*, L. R. 10 Ch. 593; and *Trevor v. Whitworth*, 12 App. Cas. 409. This is a fraud upon creditors which could be accomplished in every case, and cannot for a moment be permitted.

September 12th, 1890. ROBERTSON, J.:—

Judgment.

Robertson, J.

I have most carefully considered the matter of this appeal, and I have read all the evidence taken before the referee, and I have furthermore made a critical examination of all the books put in as exhibits kept by the company, as well as all other papers and documents, and without expressing my opinion as to the character of the whole scheme, and the conduct of the chief promoters, the appellant being one of them, I am of opinion that the referee was right in placing the name of the appellant on the list of contributories; and furthermore had the liquidator insisted upon it, I think he would have been justified in placing him there for a much larger amount than he has.

Does the appellant's own statement not shew that he is liable as a contributory, for at least fifty shares of this stock? In the first place, he declared by his petition to the Lieutenant-Governor on which the Letters Patent were issued, that he had taken 250 shares of the capital stock, and according to *In re London, Hamburgh and Continental Exchange Bank, Evans' Case*, L. R. 2 Ch. 427, his name ought to have been on the register, for 250 shares, and in that case he should be a contributory in respect to that number. Sub-sec. 2 of sec. 7 of "The Ontario Joint Stock Companies Letters Patent Act" (R. S. O. 1887, Ch. 157), under which this company was incorporated, declares, "The petition *must state the facts* required to be set forth in the notice," (i.e., the notice required by section 6 of the Act, to be published in the *Gazette* of the intention to apply for the letters patent,) "*and must further state the amount of stock taken by each applicant*, and also the amount, if any, paid in upon the stock of each applicant." And sub-section 3 declares "The petition must also state whether the amount paid is paid in cash, or by transfer of property, or *how otherwise*." And sub-section 4, requires that, "In case the petition is not signed by all the shareholders, whose names are proposed to be inserted in the letters patent, it shall be accompanied by a memorandum of

Judgment. association signed by all the persons whose names are to
Robertson, J. be so inserted, or by their attorneys, lawfully authorized in writing, and such memorandum shall contain the particulars required by the next preceding section."

By section 13, it is declared that "from the date of the letters patent *the persons therein named* and their successors, shall be a body corporate and politic by the name mentioned therein."

By section 30, "The persons named as directors in the patent shall be the directors of the company, until replaced by others duly appointed in their stead."

By section 43 "No by-law for the allotment or sale of stock at any greater discount or at any less premium than what has been previously authorized at a general meeting, or for the payment of the president, or any director, shall be valid or acted upon until the same has been confirmed at a general meeting." And the general scope of the Act, in my judgment, shews that it was the intention of the legislature under this Act, as it was, of the Parliament of Great Britain under section 23 of The Companies' Act of 1862, Imp. 25-26 Vict. ch. 89, in the words of Lord Romilly, M. R.: "to compel persons who lent their names to establish a company to be really substantially liable, and not to allow them to hold out their names as the promoters and at the same time to incur no obligations," and this was upheld on appeal by Sir G. J. Turner, L. J., and Lord Cairns, L. J.

I regret exceedingly that I am forced to come to the conclusion which I have stated, as it is most likely the appellant, was in a great measure the dupe of one other, who seems to have escaped liability, but this remark must be in a certain degree qualified by the fact, that according to the appellant's own statement he was induced to join in the enterprise, by a promise, which would have made him the holder of 150 shares of the capital stock of the Company, fully paid.

The appeal is therefore dismissed, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

SAWYER ET AL V. PRINGLE.

Conditional sale—Right to resume possession, sell, and sue for balance of purchase money—51 Vict. ch. 19, (O).

The plaintiffs sold to the defendant a machine under a written agreement, whereby the price was secured by promissory notes, and the property was not to pass until payment in full, and on default the whole price was to become due, and the vendors might resume possession; but there was no provision as to any right of re-sale.

Default having occurred in payment of the note first falling due, the plaintiffs resumed possession, re-sold the machine, and, after giving credit for the proceeds, sued the defendant for the balance of the original price:—

Held, per *BOYD, C.*, dissenting from the decision of *ARMOUR, C. J.*, at the trial, that the plaintiffs were entitled to judgment.

Difference between American and English authority pointed out:—

Held, per *ROBERTSON, J.*, *contra*, that by resuming possession the plaintiffs put an end to the contract of sale, and had no longer any right of action in respect to it:—

Held, also, per *ARMOUR, C. J.*, that 51 Vict. ch. 19, (O.), as to conditional sales is not retrospective; and per *BOYD, C.*, that its provisions are declaratory of the common law in providing for a re-sale in case of default.

Lamond v. Davall, 9 Q. B. 1030, and *MacLean v. Dunn*, 4 Bing. 722, specially referred to.

THIS action was brought by the members of the firm of *Statement*. L. D. Sawyer and & Co., formerly carrying on business as manufacturers of agricultural instruments, against Alva N. Pringle, a thresherman and farmer, to recover the balance due in respect of certain promissory notes given by him for the purchase money of a traction engine and separator sold to him by the plaintiffs, under and in pursuance of a written agreement dated April 25th, 1888.

The price under the agreement was to be \$1,600, secured by promissory notes, which were to be signed and sent to the plaintiffs within ten days after the machines were started, and were the notes now being sued on.

The agreement contained the clause set out in the judgment of *ROBERTSON, J.*, whereby it was provided that the property in the machines should not pass to the defendant till payment in full, and that the plaintiffs might resume possession on default of payment when the whole payment

Statement. should become due, and also on other good cause, and other provisions not necessary to be mentioned here.

Default having occurred in payment of the first of the notes, the plaintiffs resumed possession of the machines, and sold them at auction, realizing \$1,027.80 at such sale.

The plaintiffs now claimed the balance alleged to be due on the notes after giving credit for this sum.

The defendant amongst other things alleged in his defence that he was induced to purchase on the agreement of the plaintiffs that if he could not pay the whole of the first note when it came due out of the proceeds of the previous fall's threshing, that the note should be renewed for the balance for a year. He also submitted that the plaintiffs having resumed possession of the machines as they had done, had elected to take the machines in payment of the balance of the price, and there was no consideration for the balance alleged to be due on the notes, and he had never received any consideration therefor.

The remaining facts of the case sufficiently appear from the judgments.

The action came on for trial on April 22nd, 1890, before ARMOUR, C.J., at Picton, who dispensed with the jury.

May 10th, 1890. ARMOUR, C.J.:—

I have no doubt, and I so find, that when the plaintiffs' agent took the defendant's order for the machine he promised the defendant to renew the notes mentioned therein, provided that the season was hard and it was impossible for the machine to make her payments, which I find turned out to be the case. I also find that the said agent reported, that he had so promised, to the plaintiffs before they accepted the said order. I was asked to find, as matter of law, that the letter from the defendant to the plaintiffs, under date of September 13th, 1888, and their answer, under date of September 14th, 1888, constituted an agreement in writing binding the plaintiffs to such renewal, and *Maillard v. Page*, L. R. 5 Exch. 312, was cited in support

thereof, but the view I take of the case renders it unnecessary for me to determine this contention.

Judgment.

Armour, C. J.

The order in this case is not affected by 51 Vict. ch. 19 (O.), as this order was given before this Act came into force and this Act is not retrospective in its operation.

There is no permission in this order that the plaintiffs may, after resuming possession, sell the machine and recover from the defendant the difference between the price of the machine and the price at which it was sold after they resumed possession of it.

The plaintiffs by resuming possession and afterwards selling the machine disentitled themselves to sue either upon the order or upon the notes mentioned therein: *Lamond v. Davall*, 9 Q. B. 1030; *Hine v. Roberts*, 48 Conn. 267; *Loomis v. Bragg*, 50 Conn. 228; *Third National Bank v. Armstrong*, 25 Minn. 530; *Minneapolis Harvester Works v. Hally*, 27 Minn. 495.

In my opinion the action must be dismissed with costs.

The plaintiffs now moved before the Divisional Court by way of appeal from the said judgment upon the grounds that the judgment was contrary to law and evidence, and that there was no promise to renew as alleged, and that the plaintiffs were justified in resuming possession of the machines for default, and did not thereby rescind or invalidate the contract, and were entitled to recover the balance sued for.

The motion came on for argument on June 20th, 1890, before BOYD, C., and ROBERTSON, J.

Hoyles, Q. C., and *James Chisholm*, for the plaintiffs
The cases cited by the learned Chief Justice all proceed on agreements with terms dissimilar to this. The plaintiffs were in the same position as if they had held any other security. The purchaser could not be allowed to keep the property in his possession. Just as in case of mortgage, the vendor has a right to sell, and is responsible. *Maclean v. Dunn*. 4 Bing. 722, shews that the vendor selling goods does not preclude himself from recovering damages for

Argument. breach of contract. *Lamond v. Davall*, 9 Q. B. 1030, was an entirely different case, and went off on another point. The other point is that default was avoided by the agreement to renew. But any such agreement would be one varying the terms of a written contract, and inadmissible: *Tyson v. Abercrombie*, 16 O. R. 98; *Porteous v. Muir*, 8 O. R. 127; *Smith's Mercantile Law*, 10th ed., p. 288.

J. M. Clark for the defendant. The rights of the parties must be determined from the written agreement and nothing is left to implication. The agreement expressly provides for the remedy in case of default in payment, and the plaintiffs can have no further remedy than is provided in the agreement. The maxim *expressio unius est exclusio alterius* applies: *Elphinstone Norton & Clark*, on the Interpretation of Deeds, p. 89; *Broom's Legal Maxims*, 6th ed., p. 607, 608. The case of *MacLean v. Dunn*, relied on by the plaintiffs, is quite distinguishable for the property passed to the vendee, and the vendor was agent of the vendee to effect a sale and, furthermore, there was in that case a refusal to accept the goods after a sale. The rule does not apply in the case of conditional sales. See *Blackburn on Sales*, 2nd ed., p. 468; *Campbell on Sale of Goods*, p. 330; *Benjamin on Sales* (Bennett's Am. ed., 1886), p. 747; *Addison on Contracts*, 8th ed., p. 965, 966; *Stephenson v. Wilkinson*, 2 B. & Ad. 320. The principle of *Lamond v. Davall*, 9 Q. B. 1030, applies, and that case does not turn on the question as to form of action, see *Campbell on Sale of Goods*, p. 331; *Blackburn on Sales*, 2nd ed., p. 464; *Hagedorn v. Laing*, 6 Taunt., p. 161. The American cases are quite clear, that the plaintiffs by seizing the machine and selling it have disintituled themselves to sue, see *Hine v. Roberts*, 48 Conn., 267; *Third National Bank v. Armstrong*, 25 Minn. 530; *Minneapolis Harvester Works v. Hally*, 27 Minn. 495; *Loomis v. Bragg*, 47 Amer. 638. The plaintiffs by seizing the machine and reselling it elected to rescind the contract, and thereby disintituled themselves to sue either on the agreement or on the notes. There is no absolute covenant to pay the \$1,600, but the provisions

of the agreement merely relate to the time and conditions of the payment of the price of the machine. If the plaintiffs' propositions were correct, then the plaintiffs might seize and keep the machine and also collect the full amount of the purchase money which would be obviously unjust, and cannot be presumed to have been the intention of the parties. See Barron on Conditional Sales Act, p. 54.

Then having resumed possession and put it out of their power to give the purchaser the consideration, they cannot now sue on the notes. The contract says that the price shall become due and payable, and then that on default of payment they *may* do so and so, giving them an option. As to the failure of the consideration I refer to Benjamin on Sales, p. 270. The consideration for these notes has failed, and there can be no suit now on the notes. The result of the authorities is that the vendors have rescinded the sale, and can have no remedies except as provided in the agreement. I refer to *Bulmer v. Brumwell*, 13 A.R. 411; *Ellis v. Abell*, 10 A. R. 226, and submit that the correspondence amounts to a contract to renew. Wharton on Evidence, 3rd ed., sec. 1049, shews that where there is an ambiguity about the construction of an agreement, that construction must be given effect to which would imply good faith on the part of the parties to the agreement. The plaintiffs cannot come forward and say they intended to mislead the defendant. *Maillard v. Page*, L. R. 5 Ex. 312, shews that the agreement to renew is not too indefinite. Byles on Bills, 14th ed., p. 113, is also on the construction of agreements to renew. *Bowerbank v. Manteiro*, 4 Taunt. 844 is in the same line. The only other point is that the plaintiffs having received this money and accepted it, they are bound by this fact: *Croft v. Lumley*, 6 H. L. Cas. 672.

Hoyles in reply. *Maillard v. Page*, *supra*, shews there must be a request to renew. You cannot, again, import a condition into a payment made unconditionally. Here the taking possession, was a taking under the contract, therefore it cannot be considered to be a rescission of the contract. It is merely exercising the rights given by the con-

Argument.

tract. Our right to sue cannot be taken away by our taking advantage of another provision to the contract.

[BOYD, C., what is there then to prevent you resuming possession and then suing for the full amount? What compels you to sell, and sue for the difference, there is nothing in the contract as to this?]

I think on the authorities, *MacLean v. Dunn*, 4 Bing. 722, and others you cannot do that.

[BOYD, C. But in *MacLean v. Dunn*, there was no contract. Here you are dealing with a contract. If you are going upon natural rights of the parties, why is it not right for you, having taken back the goods, to sue for any damages you have sustained and not necessarily for the full price. If you are working it out on the line of the contract that is a different thing.]

September 6th, 1890. BOYD, C.:—

In *Page v. Cowasfe Eduljee*, L. R. 1 P. C. at p. 145, it is said: "The authorities are uniform on this point, that if, before actual delivery, the vendor resells the property while the purchaser is in default, the re-sale will not authorize the purchaser to consider the contract rescinded, so as to entitle him to receive back any deposit of the price or to remit payment of any balance of it which may be still due. If this is the case where the possession of property sold remains with the vendor, *a fortiori* must it be so when there has been a delivery, and the vendor takes it out of the possession of the purchaser and re-sells it."

The written contract between the parties in this case provided that the property in the machine should remain in the vendors till full payment of the price, but the purchaser to have the right to use until any default in payment, when the whole price remaining unpaid should become due and payable as cash forthwith, and in default of payment of price in full the vendors might resume possession. This stipulation gives a right of action for the

full price upon default in payment and a concurrent right to resume possession of the chattel. Beyond this the written contract is silent.

Judgment.

Boyd, C.

Default arose and possession was taken of the machine which was sold after due notice—the proceeds credited and action brought for the balance. The learned Chief Justice held that by such sale the plaintiffs disentitled themselves to maintain this action. The American cases cited support this holding, but the only English decision cited, that of *Lamond v. Davall*, 9 Q. B. 1030, is distinguishable and does not to me appear inconsistent with the plaintiffs right to recover. That was a case in which there was an express reservation of the right to re-sell upon the buyer's default. The exercise of that power rescinds the contract and an action for the difference in price cannot rest upon that original contract but must be a special action for damages. Benjamin marks the distinction between that and such a case as *MacLean v. Dunn*, 4 Bing. 722, where there was no such reservation, and therefore a case much like this. That author says, (Bennett's Am. ed. 1888) p. 741, sec. 787: "When such express reservation does not exist, the effect of a re-sale not being to rescind the sale, the goods are sold by the unpaid vendor, *qua* pledgee, and as though the goods had been pawned to him. They are sold as being the property of the buyer, who is, of course, entitled to the excess, if they sell for a higher price than he agreed to give." At a later page, 746, sec. 794, Benjamin sums up thus the result of the cases: "The vendor's remedy, after a re-sale made in the absence of an express reservation of that right, is an action on the original contract, which was not rescinded by the re-sale. And in this action he may either recover as damages the actual loss on the re-sale, composed of the difference in price and expenses, or he may refuse to give credit for the proceeds of the re-sale, and claim the whole price, leaving the buyer to his counter-claim for damages for the re-sale."

Here the contract enables the plaintiffs both to resume

Judgment.
Boyd, C.

possession upon default and to sue for the recovery of the whole unpaid price. The mere fact of selling the machine had not any other effect, it appears to me, than to fix the value of the machine as deteriorated by the defendant's user of it.

If I am right in this position, then the provisions in the Conditional Sales Act, which was enacted subsequently to this contract, are declaratory of the common law in providing for a resale in case of default.

As against the States' decisions relied on below, it may be enough to cite on the other side the language of Mr. Justice Bradley in delivering the opinion of the Supreme Court of the United States in *Harkness v. Russell*, 118 U. S. R. at p. 667 (1886). The instrument there in hand was one which was a mere agreement to sell upon a condition to be performed, i.e., on condition that sale notes were paid at maturity. It was stipulated in terms that till then the title should not pass though possession was given; and it was further stipulated that on failure to pay, or if the vendors deemed themselves insecure before maturity of the notes they could repossess themselves of the machinery and credit the then value of it, or the proceeds of it if they should sell, upon the notes, and the balance of price still to be paid as damages, &c. The judgment then proceeds: "This stipulation was strictly in accordance with the rule of damages in such cases. Upon an agreement to sell, if the purchaser fails to execute his contract, the true measure of damages for its breach is the difference between the price of the goods agreed on and their value at the time of the breach or trial, which may fairly be stipulated to be the price they bring on a resale. It cannot be said, therefore, that the stipulation of the contract was inconsistent with, or repugnant to what the parties declared their intention to be, namely, to make an executory and conditional contract of sale."

The learned Chief Justice has not passed upon another branch of the case though he finds the facts to be that when the plaintiffs' agent took the order he promised the

defendant to renew the notes mentioned therein provided that the season was bad and it was impossible for the machine to make her own payments (which is also found to be the case). It is also found that the said agent reported that he had so promised to the plaintiffs before they accepted the order. But one has to go further than this to appreciate the exact position of the parties.

Judgment.

Boyd, C.

Upon the evidence the defendant refused to sign the notes at first, because the machine would not work. This was remedied. Then correspondence ensued between the company and defendant. In his letter of September 13th, 1888, he writes: "When I gave my order to Mr. Ross (the company's agent) he told me that you would renew the notes providing that the season was hard and it was impossible for the machine to make her payments." The company respond to this as follows the next day, "Mr. Ross knows the fair and honourable manner in which we are in the habit of dealing with our customers, and thereupon assured you that you need have no fear of being harshly dealt with so long as you shewed yourself deserving of it. If your season's threshing turns out not so successful as you expected and you cannot pay your note quite in full you may depend upon our dealing as leniently with you as circumstances require." On September 20th the company again wrote for the notes and after this the defendant signs, and in his own evidence says: "When I signed the notes they said they would deal leniently with me or I would not have signed the notes." When the first note was due, on January 1st, the defendant paid \$115 on it, which the Judge finds was all he could pay out of that season's work: he writes, "I could not make the money so you can do as you think best, whether you give me a renewal or sell me out for the note."

On January 15th, 1889, the company write acknowledging the payment, and say he must have \$100 by February 1st. "It is impossible to renew for as large an amount as you want." They write again on February 11th, 1890, saying that unless they get \$200 by the 25th

Judgment.

Boyd, C.

instant they will have to put costs on. They write again on March 4th and give till the 15th of the month to pay. Then they seized the machine, giving the defendant notice on June 12th of the sale by auction to be held on June 26th. The defendant attended the sale and makes no objection to it in his evidence or pleading.

The result of this evidence shews, I think, that the transaction was closed by the defendant on the authority of the letter written by the company on September 14th, in which they agree to no more than this, that if the season was not successful they would extend the time if he did not pay the notes quite in full. The payment of \$115 on a note of \$533 was no compliance with this, and the letter of the defendant, dated January 1st, 1889, in which he sends this money, evidently contemplates this—in it he says, “You can do as you think best—renew or sell me out.”

As I view the evidence in the light of the correspondence the defence fails on the facts, as I think it does on the law. While it may be that some of these companies deal harshly and unmercifully with persons in their power, I am not sure that this was so in the present case; there is no doubt much risk incurred in parting with these machines and the makers of them have to exercise vigilance and strict business accounting in order to keep themselves safe. The Court cannot mediate between seller and purchaser, and when the law permits agreements such as the present, parties entering into them have to protect themselves.

The result of the whole investigation leads me to hold that the plaintiffs should have judgment for the amount of their claim, with costs. As a condition of judgment the notes should be delivered up, and on payment the land should be discharged of the lien.

ROBERTSON, J. :—

I regret that I cannot agree with the conclusion come to by the learned Chancellor. Apart from the special

findings of the learned Chief Justice, who tried the case, I am of opinion that the plaintiffs cannot succeed in this action. The agreement between the parties contains this provision, "It is hereby agreed between the parties hereto, that the property in the said machines shall not pass from L. D. Sawyer & Co., to the said proposed purchaser until full payment of the price and any obligations given therefor, but the said proposed purchaser to have possession and right to use at once, until any default in payment as aforesaid, when the whole price or obligation therefor shall become due and payable, and in default of payment of price and obligation in full, L. D. Sawyer & Co. may resume possession, which they may also do if any of the statements herein made are ascertained to be untrue, or if the said proposed purchaser become insolvent or permit executions against him to remain unsatisfied, or abscond, or leave the machines unprotected, or when L. D. Sawyer & Co. deem it necessary to resume possession for other good cause." There is no provision that the machine could be sold, and the loss should fall on the vendee.

Until the whole of the purchase money agreed to be paid is actually paid the defendant would have no property in the machines; he had a right to the possession until default, or until the other things happened which are specified, or until L. D. Sawyer & Co. should deem it necessary to resume possession for other good cause. So that if the defendant had paid four-fifths of the purchase money Sawyer & Co. could, on default of payment of the remaining one-fifth, or "for other good cause" to them seeming necessary, resume possession and the defendant would be helpless, as there is no right to redeem.

In *Aspdin v. Austin*, 5 Q. B., at p. 684, Lord Denman, C. J., says, "Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument." Now, here the agreement

Judgment. in express terms declared that the property should only
Robertson, J. pass to the proposed purchaser upon the payment of the whole of the purchase money, or the obligations given therefor. Until that is accomplished the property in the machines was in D. L. Sawyer, & Co.

They had the undoubted right to resume possession whenever any of the events mentioned should happen, that is they could say, "We for good cause resume possession, the property is in us already, the possession in you, but we will put an end to your possession by resuming it." And by this means they, to all intents and purposes, put an end to the contract. They were not necessarily bound to assume that position; if they had thought proper they could have sued on the promissory notes, and left the possession in the defendant, but having elected to resume possession they have in my judgment no cause of action for whatever may be due on the purchase money. They choose to take the machines and sell them at a forced sale; if they have not realized sufficient to square the account, it is their own fault. *MacLean v. Dunn*, 4 Bing. 722, cited by plaintiffs' counsel, is not in point. There the sale was absolute, and the action was to recover damages for the loss to the plaintiffs consequent upon the defendants refusal to carry out the contract. There is no doubt whatever in such a case the defendant would be liable for the loss sustained by the plaintiff, and the only way the loss could be ascertained would be by a sale of the goods. The plaintiff might have brought assumpsit for goods sold had he so chosen and recovered the full contract price, but he had the other remedy also, the defendant having refused to carry out his purchase, by taking away the goods. Here there was really no sale. It was expressly agreed that the sale was not to be complete until the whole of the purchase money was paid, and that in case of a default the plaintiffs were to have the option of resuming possession and thereby putting an end to the proposed sale. They exercised that right, repossessed themselves of their property, and that put an end to the transaction.

In *Lamond v. Davall*, 9 Q. B. 1030, the action was Judgment ^{Robertson, J.} assumpsit for shares &c., bargained and sold, and sold and delivered. It appeared that the plaintiffs were auctioneers and had sold the shares to the defendant at £79, and had afterwards sold them at £63, and were now suing for the £79. The facts were as follows: the goods had been knocked down to the defendant; it was a condition of the sale, that they might be re-sold unless the purchase money was paid on the following day, the bidder making default, being answerable for the loss on re-sale. The plaintiffs had exercised this right and had secured £63 from a re-sale. The defendant contended for a nonsuit, because the power of re-sale was in effect a condition for making void the sale. The evidence was therefore of a conditional sale, which had been made void, whereas the declaration, or cause of action was on an absolute sale still subsisting. The trial Judge nonsuited the plaintiff, and the Court held that the nonsuit was right.

In all the cases, which I have been able to find, of the right to resell and look to the purchaser for damages, in cases of loss, there was an absolute sale, and a vesting of the property in the goods in the purchaser, with the right of retaining possession by the vendor until payment, or some other condition performed, or the purchaser had refused to remove the goods, &c., leaving them on the vendor's hands. But in the case now before this Court, there was no vesting of the property, nor was there any provision for a sale. The plaintiffs reserved the right of property in themselves; in fact there was only a conditional sale; to become absolute on payment in full of the purchase money. No doubt it would have been competent for the parties to have agreed that in case of default, the plaintiffs might not only resume possession, but sell the goods, the defendant to make good any difference between the amount realized at the sale, and that agreed to be paid by the defendant in the first instance, but there was no such agreement, and I think the law is unquestionably as laid down by Lord Denman in *Aspdin v. Austin*, already

Judgment. referred to, that it is *manifestly undesirable* to extend Robertson, J. *expressed stipulations by any implications?* See also *Dunn v. Sayles*, 5 Q. B. 685.

I am therefore of opinion that the conclusion come to by the learned Chief Justice who tried the case is correct, and, I think, is borne out not only by English and Canadian authorities but by the American cases cited by his Lordship.

The conditional agreement between the parties is one which, in my judgment, should not be otherwise construed than most strictly, and nothing should be inferred in favour of the plaintiffs. It is decidedly one-sided, and that side is for the plaintiffs. They, in fact, give up nothing until every jot and tittle is performed by the defendant, and the property in the goods does not pass until the defendant's part is fully and completely performed; and they take care to secure themselves against all possible loss by insisting upon the defendant charging, in effect, all his real property with the purchase money.

Then again, the evidence suggests, if it does not disclose, the fact that the plaintiffs keep in their employment agents who seek out the parties to whom they endeavour, by that kind of persuasive influence which is unfortunately too frequently listened to by the unsuspecting yeoman of the country, to dispose of their wares, and who induce the proposed purchaser to enter into a transaction which he, in all probability, does not fully understand, and to which if he had been left to his own judgment, most likely, would not have been a party; and besides all that there was no independent advice, the paper having been prepared in advance, the defendant having had, or taken no part in its formation, and which, according to the finding of the learned Chief Justice, did not contain the whole agreement as understood by the defendant, he trusting to the verbal promises and representations of the agent.

I have therefore, less difficulty in coming to the conclusion that I have in favour of the defendant, and having done so, I have not considered the authorities referred to

by Mr. Hoyles, in reference to the question as to whether ^{Judgment.} there was a binding agreement to renew the notes given ^{Robertson, J.} for the price of the machines.

The motion therefore, in my judgment, should be dismissed with costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

MARTHINSON V. PATTERSON.

Chattel mortgage—Defect—Taking possession—Rights as against subsequent mortgagee—Full amount of mortgage money not advanced—Effect of—Foreign contract as to chattels in Ontario.

A defect in a chattel mortgage is not cured, as against a subsequent mortgagee, by taking possession of the chattels, where the subsequent mortgage was made before such possession, although at the time of the seizure there was no default under the subsequent mortgage, and the mortgagor was by the terms of it entitled to retain possession until default.

Where the full amount mentioned in a chattel mortgage is not actually advanced at the date at which it is given, it should, nevertheless, in the absence of fraudulent intent or bad faith, stand as against a subsequent mortgagee as a security for the amount actually advanced at the time when the subsequent mortgagee's rights accrued.

The rights of parties resident in a foreign country and there making a contract in regard to goods in Ontario, so far as the formalities of registration or change of possession are concerned, are governed by the law of Ontario.

River Stave Co. v. Sill, 12 O. R. 557, followed.

THIS was an action of replevin for a number of horses, cattle, sleighs, &c., being the outfit of a lumbering camp in the township of Houghton, in the district of Algoma. Statement.

The plaintiff claimed the property under two instruments made by Messrs. R. Rayburn & Son. The first was in the following words:

"Alpena, Mich., Oct. 8, 1888. Received of Charles Marthinson nine thousand dollars in full of all demands for one entire camp outfit, consisting of twenty-two teams of horses, two yoke of oxen, tools, equipage, utensils of every description, supplies, and all kinds of merchandize. R. Rayburn & Son."

Statement.

It was proved that at the time this instrument was signed the parties all lived in Michigan, and that it was signed there; that the property intended to be covered by it was in the township of Houghton, in Canada; that Rayburn & Son were getting out timber there under a contract with Marthinson's firm; and that the \$9,000 mentioned in the receipt was not advanced at the time, but was part of a large unadjusted balance of accounts between the parties; and that the property mentioned was to be held by Marthinson's firm as collateral security for the balance, whatever it might be. No change of possession took place at the time this instrument was signed. The second instrument was a chattel mortgage, dated 24th December, 1888, from Robert Rayburn & Son to Charles Marthinson and the members of his firm for \$14,009.51, upon substantially the same property, payable on or before 1st July, 1889. The affidavit of *bona fides* attached to this mortgage was admitted by plaintiff's counsel to be imperfect so as to render the mortgage inoperative under the statute as against creditors, &c.

On 29th April, 1889, R. Rayburn & Son executed a chattel mortgage to John Patterson, the original defendant in the action, to secure the payment of \$2,500, upon the property in question in this action, being a portion of the property covered by the two instruments above mentioned; the mortgage money was made payable on 1st November, 1889, with interest at seven per cent. The mortgage contained the usual provision entitling the mortgagee to take possession of the property in case of default in payment of the mortgage money; or in case the mortgagors should attempt to sell or dispose of or part with the possession of the property, or to remove the same out of the district of Algoma, or suffer or permit the same to be seized or taken in execution without the consent of the mortgagee; and a further provision that until default the mortgagors should have peaceable possession. At the time this mortgage was given, only \$2,000 or thereabouts had been actually advanced by the mortgagee, but he had bought up claims for wages

against the mortgagors, and had agreed with them to ^{Statement} advance the difference up to \$2,500, as it was required.

On 3rd July the plaintiff, acting for himself and his partners, seized the property, default having been made in payment of the amount due them by Rayburn & Son; on the same day, or a day or two afterwards, the defendant John Patterson took the property out of the possession of the plaintiff's servants, whereupon the plaintiff began this action and replevied the property. After the commencement of the action the original defendant, John Patterson, died, and it was continued against Jenny Patterson as administratrix *ad litem* to his estate.

The action was tried before STREET, J., at the Sault Ste. Marie Assizes on 12th July, 1890, and was argued, at the request of counsel, in Toronto, on 28th August, 1890.

Shepley, Q.C., for the plaintiff. The chattel mortgage to the plaintiff did not comply with the Act respecting mortgages and sales of personal property, R. S. O. ch. 125, owing to a defect in form of the affidavit of *bona fides* required by sec. 2. Sec. 4 provides that "In case such mortgage or conveyance and affidavits are not registered as hereinbefore provided, the mortgage or conveyance shall be absolutely null and void as against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith for valuable consideration." The word "creditors" here means "creditors in a position to seize:" *Parkes v. St. George*, 10 A. R. 496. I submit that the words "subsequent purchasers or mortgagees" must receive a like construction; and that the defect in the plaintiff's mortgage was cured by his taking possession before the defendant's right to seize accrued, a clause in the defendant's mortgage providing that the mortgagor is to have possession until default, and there having been no default when the plaintiff took possession. I refer to Barron on Bills of Sale, 2nd ed., pp. 142-3. The defendant's mortgage is bad as against the plaintiff because the full amount mentioned

Argument. in it had not been actually advanced at the date at which it was given: *Parkes v. St. George*, 10 A. R. at p. 543, per Osler, J. A., which was after the decision of *Barker v. Leeson*, 1 O. R. 114; Barron on Bills of Sale, 2nd ed., p. 358. As to whether the foreign law or the law of Ontario is to govern with respect to the contract of the 8th October, 1888, *River Stave Co. v. Sill*, 12 O. R. 557, seems against the plaintiff, and will probably be followed, but the point is not abandoned.

Masson, Q.C., for the defendant. As to the whole consideration not being advanced when the defendant's mortgage was made, I refer to *Beecher v. Austin*, 21 C. P. 334; *Baldwin v. Benjamin*, 16 U. C. R. 52; *Valentine v. Smith*, 9 C. P. 59; *Walker v. Niles*, 18 Gr. 210; *Hamilton v. Harrison*, 46 U. C. R. 127 and note on p. 132. The defendant had a right to possession at the time the plaintiff seized: *Herman on Chattel Mortgages*, sec. 134, pp. 335-6.

September 6, 1890. STREET, J. :—

The rights of the parties to this action as affected by the receipt of 8th October, 1888, must be governed by the law of this Province, and not by the law of Michigan, notwithstanding the fact that the parties to the contract were resident in that State at the time it was made, and it was made there: *River Stave Co. v. Sill*, 12 O. R. 557. As none of the formalities required by our law were observed, and the possession of the property remained in the mortgagors, the instrument is ineffectual as against creditors and subsequent mortgagees or purchasers for value.

The mortgage to the plaintiff of 24th December, 1888, is also operative only between the parties, because of the insufficiency of the affidavit of *bona fides*.

The plaintiff, however, relies upon the fact of his having obtained possession of the goods on 3rd July, 1889, under his chattel mortgage, as effectually curing the defects in the written instruments, citing *Parkes v. St. George*, 10 A. R. 496; Barron on Bills of Sale, 2nd ed. pp. 142-3, and he

argues that because the defendant's chattel mortgage gave the mortgagors a right to retain possession until default, and no default had taken place at the time of the plaintiff's seizure, the defendant's mortgage was no bar to the plaintiff's right to cure the defect in his title by obtaining possession.

Judgme t.
Street, J.

I cannot coincide in this view of the law, and I think a short examination of the principles involved will shew that it is not the correct one.

The formalities of registration, &c., required by our Chattel Mortgage Act are in substitution for the actual change of possession; when a contemporaneous change of possession take place, the mortgage is good without these formalities. If then a mortgage is made without change of possession and without the statutory formalities, being good between the parties, it continues good until other parties acquire rights which conflict; until that time arrives it may be perfected at any time by the act which would have originally made it good against all the world, namely, a change of possession, because it would up to that time have been competent for the original parties to enter into a new and perfect transaction. But when other persons have acquired rights in the property, it is then too late for the original parties to enter into any new transaction that is not subject to those rights; and for the same reason it is too late for them to perfect their imperfect transaction by a change of possession. The mere fact of the existence of creditors is not sufficient to prevent the original parties doing this, for creditors who have not obtained judgment and execution have no claim upon the goods; but an actual transfer of an interest in them by the original mortgagor stands in a different position; the transferee becomes an absolute or conditional owner of them, as the case may be, and the intervention of his right of property, although it may not be accompanied by a right to immediate possession, being sufficient to prevent the mortgagor from giving a new title to the original mortgagee, is also sufficient to prevent the original mortgagee from

Judgment. perfecting his original title by taking possession. The title
Street, J. he acquires by taking possession must be subject to the rights which have intervened.

The plaintiff further urged that the defendant's mortgage was bad as against him, because the full amount mentioned in it had not been actually advanced at the date at which it was given.

There being nothing to shew any fraudulent intention or want of *bona fides* in the insertion of the amount intended to be advanced, I think the mortgage should under the authorities stand as against the plaintiff as a security for the amount which had actually been advanced at the time the plaintiff took possession of the goods. See the cases upon the point collected in *Parkes v. St. George*, 10 A. R. at pp. 500 *et seq.*

I think, therefore, that the defendant was entitled to the possession of the goods at the time they were replevied, and that she should succeed in this action. It was stated by counsel that the goods by consent have been sold, and that the proceeds have been left in the plaintiff's hands pending the result of this action, and it was agreed that the judgment, if in the defendant's favour, should be for payment to her of the amount of her claim out of the amount realized from the sale of the goods, and her costs, and not for a return of the goods. If the parties cannot agree upon the amount payable to the defendant, there will be a reference to the proper officer for the purpose of ascertaining it. The amount so ascertained as due her for principal and interest must be paid into Court, as the defendant is only administratrix *ad litem*, and may be paid out when a full administration is granted.

[An appeal from this decision is pending before the Divisional Court.]

[COMMON PLEAS DIVISION.]

JOHNSON V. MCKENZIE.

Executors and Administrators—Executor becoming bankrupt and intemperate—Injunction restraining interfering with assets, and appointment of receiver.

Where a person named as an executor was at the time of the making of the will in excellent credit and circumstances, but after the death of the testator became insolvent and made an assignment for the benefit of his creditors, and also apparently became intemperate, an injunction was granted restraining him from interfering with the estate; and the appointment of a receiver was directed.

THIS was a motion to continue an injunction and for ^{Statement.} the appointment of a receiver to the estate of Murdoch Johnson, deceased.

June 21, 1890. *Hoyles*, Q.C., for the plaintiff.

J. Hoskin, Q.C., for the infant defendant.

R. M. Meredith, for the defendant McKenzie.

July 4, 1890. STREET, J. :—

The facts shewn by the affidavits in substance were as follows :

Murdoch Johnson, the deceased, made his will in the year 1881, and appointed the defendant, Donald McKenzie, his executor. In the year 1888 he made a codicil to his will, making no change in regard to the executorship, and died on 6th April, 1890. Under the will and codicil, the widow is entitled to receive during widowhood the income of the estate, both real and personal: at her death her grandson, Murdoch Johnson is entitled to half, or in certain events, to the whole of the personalty, and also in certain events, to the whole of the realty. Murdoch Johnson, the grandson, is a defendant in this action. He is an infant of the age of eleven years, or thereabouts, and appears by the official guardian, who strongly supports the present application.

Judgment.

Street, J.

The personal estate consists of some \$3,000 in deposit in banks: the real estate of a house and lot in the village of Parkhill.

At the time the will was made, the defendant, Donald McKenzie, was in excellent credit and circumstances, and both appear to have been but little impaired at the time the codicil was executed.

In the year 1889, however, he became insolvent and made an assignment for the benefit of his creditors, and he is now possessed of no means whatever.

It is very positively asserted in the affidavits filed on behalf of the plaintiff, that he has become strongly addicted to drink: that he is unfit in every way to perform the duties of an executor; and that the property devolving upon him would be unsafe in his hands.

The numerous affidavits filed in reply speak of him as "steady," "conscientious," "honest," and "reliable," but do not in terms meet the charge of intemperance, except in so far as that charge may be intended to be negatived by the description "steady." The defendant himself does not expressly deny it.

It is also not denied that he became insolvent, and made an assignment in 1889 for his creditors' benefit; and it is not asserted that he is possessed of any means whatever.

It is clear that the Courts have always refused to interfere with the administration of an estate by an executor merely because he was poor: nor will they interfere where the testator has named as his executor a person known by him to be bankrupt or insolvent at the time he appointed him, unless there are reasons for believing that the interests of the persons entitled under the will are in danger. It seems to be equally clear, however, that the Courts have been in the habit of interfering with the administration when the executor named by the testator has become bankrupt or insolvent after the making of the will, though in the testator's lifetime, and without any special danger or any misconduct being shewn: *Howard v. Papera*, 1 Madd. 142; *Gladdon v. Stoneman*, 1 Madd. 143a; *Langley*

v. *Hawk*, 5 Madd. 46; *Stainton v. Carron Co.*, 18 Beav. 146, at p. 161. Judgment.
Street, J.

It is clearly not necessary to wait until the executor has received the assets before taking action, because then the interference might come too late.

The defendant McKenzie relied upon the case of *Re Bush*, 19 O. R. 1, as shewing that the Court will not remove an executor from his position, and appoint another in his stead. It is not, however, to be supposed that that case was intended to decide that the Court would not, under any circumstances, interfere with the administration by an executor of the estate in his hands. The formal removal of the executor is not in the present case asked. What is asked is, that he be restrained from collecting or interfering with the assets, and that a receiver be appointed to collect them, and bring them into Court. The jurisdiction to grant such relief is undeniable, and I think it should be exercised in the present case. There will therefore be the usual order for the appointment of a receiver, and the injunction will be continued. There is no need for further contest or litigation, and I will further hear this motion as a motion for judgment upon notice to be given by the plaintiff upon the material at present before me.

[CHANCERY DIVISION.]

ELLIOTT V. ELLIOTT ET UX.

Landlord and tenant—Covenant to expend manure upon the premises—Manure made after expiry of term—Mesne profits—Claim in former action—Estoppel.

A lessee covenanted to use upon the demised premises all the straw and dung which should be made thereupon :—

Held, that the lessor was entitled to recover for manure removed from the premises which was there at the expiry of the term, but not for manure made thereafter, while the lessee was overholding.

Hindle v. Pollitt, 6 M. & W. 529, followed.

In a former action of ejectment brought by the plaintiff against the defendants, mesne profits were claimed, but no evidence was given in regard to them :—

Held, that the plaintiff was not estopped from recovering in this action occupation rent for the premises since the expiry of the term.

Statement.

THIS action was brought by James Elliott against Mary Ann Elliott, and Samuel Elliott, her husband.

On the 29th May, 1888, one William Ewart made a lease of a farm to the defendant Mary Ann Elliott, from the 29th May, 1888, till the 1st December, 1888, and both defendants went into possession under the lease.

On the 5th July, 1888, Ewart sold and conveyed the farm to the plaintiff subject to the lease.

After the expiry of the term the defendants remained in possession, and did not go out till the following April.

In the lease the defendant Mary Ann Elliott covenanted that she would during the term cultivate, till, manure, and employ the lands in a good husbandlike manner, &c., and at the end of the term would leave the land so manured as aforesaid, and would also spend, use, and employ in a husbandlike manner upon the premises all the straw and dung which should grow, arise, remain, or be made thereupon.

This action was brought for damages for breach of these and other covenants in the lease, and for injuries to the premises, and for occupation rent since the expiry of the term.

The action came on for trial at Woodstock, on the 11th March, 1890, before STREET, J., who gave judgment by consent ordering that all questions of fact arising or to arise should be tried before H. B. Beard, Master at Woodstock, as a special referee, under sec. 102 of the Judicature Act. Statement.

On the 24th April, 1890, the referee made his report, finding against the plaintiff's claim for damages for removal of manure, and finding the damages upon the whole claim against the defendants at \$110, with costs on the lower scale.

The plaintiff appealed from the report on the ground among others, that the Master was wrong in not allowing the plaintiff damages for manure taken off the farm by the defendants.

The defendants also appealed from the report on the ground that the Master had improperly allowed the plaintiff occupation rent, mesne profits having been claimed but not allowed in an action of ejectment brought by the plaintiff against the defendants.

The appeal and cross-appeal were argued before BOYD, C., in Court on the 25th September, 1890.

J. B. Clarke, Q.C., and *J. B. Jackson*, for the plaintiff, in support of the appeal cited *Hindle v. Pollitt*, 6 M. & W. 529.

Middleton, for the defendants, contra, contended that at all events nothing should be allowed for manure after the expiry of the lease and during the time the defendant Mary Ann Elliott was an overholding tenant, because her covenant did not extend beyond the term. In support of the cross-appeal he contended that the occupation rent should not have been allowed, because the claim therefor was *res judicata* by the judgment in the former action, in which a claim for mesne profits was made, and evidence bearing upon it was given in conjunction with evidence bearing on the question of possession, though the amount

Argument. of damages was not proved. He referred to R. S. O. ch. 44, sec. 52, sub-sec. 12 ; *Sorenson v. Smart*, 5 O. R. 678, 683.

Clarke, in answer to the cross-appeal, referred to Bigelow on Estoppel, 5th ed., p. 187.

September 30, 1890. BOYD, C.:—

As to the removal of manure the covenant provides that what is made on the place is to be used thereupon. The case cited in 6 M. & W. is an authority to cover the present. I cannot extend the liability against the tenant, the married woman, beyond the terms of the covenant. The evidence shews that forty or fifty loads were removed from the farm which were there at the expiry of the lease. This was a breach of the covenant, and I fix damages therefor at forty dollars.

As to the cross-appeal, it should be dismissed. In the former action of ejectment or for possession, mesne profits were claimed and might have been recovered, but it was admitted before the Master that no evidence was given on the latter head of claim, and if not there is no estoppel against now proving what occurred, and getting recovery of the proper amount.

The plaintiff should get costs of this appeal and cross-appeal on the lower scale.

G. A. B.

[QUEEN'S BENCH DIVISION.]

TREMEEAR V. LAWRENCE.

Solicitor's lien—Costs of actions to restrain sale of estate—Lien upon estate in hands of assignee—Absence of fund upon which lien could attach—Costs.

Two actions were brought by a trader, to restrain proceedings under a chattel mortgage against the trader's stock of goods, and interlocutory injunctions were granted, but the actions were not carried further. The chattel mortgagee brought an action to recover the mortgage money and to restrain the mortgagor from selling the goods, whereupon the latter made an assignment for creditors, and, by arrangement in that action, the goods were sold by the assignee, and payment was made in full to the mortgagee for debt, interest, and costs of that action, after notice and without objection on the part of any of the creditors or of the solicitor who conducted the actions brought by the trader.

The solicitor claimed that by his exertions in these actions he had saved the goods from being sacrificed by summary sale, and brought this action to have it declared that he was entitled to a preferential lien for costs upon the estate in the hands of the assignee:—

Held, that, even if it were shewn that stopping the sale under the mortgage were a benefit to the estate, there was no jurisdiction, without the direction of a statute, to charge the property recovered or preserved, and without a money fund there was no subject for a lien.

Costs as of a successful demurrer only were allowed to the defendant.

THE statement of claim set out that the plaintiff was a solicitor, and the defendant the assignee for creditors of the estate of Samuel J. Lyons, under a deed of assignment dated 19th March, 1890, pursuant to R. S. O. ch. 124; that on or before the 3rd January, 1890, Lyons and one Burgess carried on business as partners and were the owners of a stock-in-trade in their store at Aylmer, subject to a chattel mortgage thereon to one Schooley; that on or about the 9th January, 1890, Schooley threatened to enter into possession of the stock-in-trade mentioned and to sell it, notwithstanding that no sum had accrued due under his mortgage and that no default had been made thereunder; that on the 9th January, 1890, the firm of Lyons and Burgess instructed and retained the plaintiff to take proceedings to restrain the threatened seizure of their stock, and the plaintiff accordingly instituted an action claiming that Schooley might be restrained from seizing or taking any proceedings under his chattel mortgage, and also applied for and on the 10th January, 1890, obtained an interim

Statement. injunction restraining Schooley from seizing, &c., which injunction was on the 4th March, 1890, continued until the trial; that on or about the 17th March, 1890, Schooley by his bailiff entered into possession of the stock-in-trade, notwithstanding the injunction mentioned, and Lyons upon such proceedings being threatened instructed the plaintiff to enter an action against Schooley to restrain any such seizure and possession, and the plaintiff brought an action and on the 17th March, 1890, obtained an injunction restraining such seizure; that on or about the 14th March, 1890, Schooley instituted an action against Lyons to recover the mortgage debt and to restrain Lyons from selling the stock, and obtained an *ex parte* order placing the sheriff in possession, and the sheriff took possession of the stock and closed the store; that on the 17th March, 1890, the partnership of Lyons and Burgess was dissolved, Burgess retiring, and Lyons taking over the stock-in-trade and continuing the business; that the plaintiff was instructed by Lyons to defend the action brought by Schooley, and did defend the same, and an order was made therein on the 22nd March, 1890, that the defendant (to whom Lyons had in the meantime assigned) should have possession of and should sell the stock, and under and by virtue of this order the defendant obtained possession of the stock from the sheriff and subsequently sold it for \$4,030.63, and received payment therefor; that Lyons was indebted to the plaintiff (subject to a taxation) in the sum of \$404.96 in respect of the different actions before mentioned; that a bill of the plaintiff's fees, charges, and disbursements, duly subscribed by the plaintiff, together with an affidavit verifying the plaintiff's claim, was rendered to the defendant on the 3rd April, 1890.

The plaintiff claimed that by reason of his services as aforesaid and of the legal proceedings mentioned, the stock in trade was preserved and recovered for the benefit of Lyons and Burgess, and of Lyons, and for the benefit of the defendant as assignee; and he prayed that it might be declared that he was entitled to a lien upon the proceeds of the sale for the sum of \$406.96, and that he was entitled

to a preference for such claim in the winding-up of the estate; and for payment of such sum and interest and costs.

By his statement of defence the defendant admitted the taking of the proceedings mentioned and the retainer of the plaintiff; but he said that after the institution of the various actions mentioned in the statement of claim, Lyons assigned to the defendant his equity of redemption in the goods in question for the benefit of his creditors, and such proceedings were thereupon had that the defendant was made a party to the action brought by Schooley, and it was therein adjudged that the chattel mortgage made to Schooley was valid and that Schooley was entitled to enforce it, and the goods were sold and the mortgage debt was paid to Schooley out of the proceeds, together with his costs of the proceedings; and the defendant submitted that the equity of redemption of Lyons in the goods was in no way recovered or preserved by reasons of the actions and proceedings taken, but was rather diminished by reason of Schooley becoming entitled to add to his claim his costs of the proceedings, and that the plaintiff was not entitled to any lien on the moneys in his hands or to a preferential claim upon the estate of Lyons. The defendant further stated that the surplus money arising from the sale of the goods was paid to him as assignee, and that the goods and moneys never were in the possession of the plaintiff.

The action was tried before BOYD, C., at the Chancery Sittings at St. Thomas, on the 1st October, 1890.

Argument was heard at the close of the evidence.

Colin Macdougall, Q. C., for the plaintiff, referred to *Clark v. Eccles*, 3 Ch. Chamb. R. 324; *Bozon v. Bolland*, 4 My. & Cr. 354; *Cordery on Solicitors*, 2nd ed., p. 308; *Re White*, 17 L. R. Ir. Ch. 223; *Twynam v. Porter*, L. R. 11 Eq. 181; *Turwin v. Gibson*, 3 Atk. 720; *Jones v. Turnbull*, 2 M. & W. 601; *Guy v. Churchill*, 35 Ch. D. 489; *Pulling on Attorneys*, 3rd ed., pp. 381-2.

Argument.

Shepley, Q. C., for the defendant. The action is based on a confusion of ideas as to the theory of such an action. The mortgagor had only the equity of redemption; the mortgagee had the right to be paid; the equity of redemption was never in peril or attacked at all; and the solicitor was never called upon to protect, preserve, or recover it.

Macdougall, in reply. The property in question is the stock-in-trade, and the question is: was it preserved by the solicitor's exertions?

October 11, 1890. *BOYD, C.*:—

In the absence of statutory provisions such as are found in England, there is no jurisdiction to entertain an action like the present, which seeks to have it declared that the solicitor is entitled to a preferential lien for costs over other creditors in the administration of his client's assets by an assignee under R. S. O. ch. 124.

The services rendered by the solicitor were the bringing of two actions to restrain proceedings against the client's stock of goods under chattel mortgage. The defendant in these actions claimed under two alleged breaches of the conditions a right to enter and sell. Each action went as far as interlocutory injunction, and the solicitor claims that this saved the goods from being sacrificed by summary sale. The mortgagee then brought an action to recover the mortgage money, and to restrain the mortgagor from selling in any other way than over the counter, and in the ordinary way of trade, whereupon the latter assigned for the benefit of creditors, and by arrangement in that action the goods were sold by the assignee, and payment was made in full to the mortgagee for debt, interest, and costs of this last action, after notice and without objection on the part of any of the creditors, or of the plaintiff, the solicitor. This left the two actions for injunction undisposed of, and no one can say who is right in the contention there made. No fund has been recovered by the exer-

tions of the solicitor on which his lien in the particular action would attach, as at common law. At most the solicitor succeeded in arresting a sale of the goods under power of sale in the chattel mortgage, but I cannot say that this sale would have resulted in a less advantageous disposal of the goods than has been now effected by the assignee.

Judgment.
Boyd, C.

It is clear that no fund arose out of those actions; the goods were merely kept *in statu quo*. The sale in fact grew out of the assignment for creditors, which assignment was, it is admitted, a breach of the mortgage conditions, and I cannot regard the proceeds left after paying off that mortgage as a fund recovered or preserved by the exertions of the solicitor. It does not plainly appear that the insolvent's estate is better off because the sale was stopped by the injunctions, even if that would be a reason for interference. Without the direction of a statute, I cannot charge property recovered or preserved by the solicitor; and without a fund (*i.e.* in money) recovered or preserved by him, I have no subject on which to place a lien.

In every regard I think this action fails; it should have been stopped at a preliminary stage by means of demurrer; and in dismissing it I give no greater costs than of a successful demurrer.

[CHANCERY DIVISION.]

CENTRAL BANK OF CANADA V. GARLAND.

Banks and banking—Discount of promissory notes—Right of bank to recover accessory securities.

A tradesman sold goods to customers taking promissory notes for the price and also hire receipts by which the property remained in him till full payment was made. The notes were discounted through the medium of a third person by the plaintiffs, who were made aware when the line of discount was opened of the course of dealing, and of the securities held. They were not, however, put in actual possession of the securities, and there was no express contract in regard to them.

In an action to recover the securities or their proceeds from the assignee for creditors of the tradesman :—

Held, that the securities were accessory to the debt ; that in equity the transfer of the notes was a transfer of the securities ; that the defendant was in no higher position than his assignor, and could not resist the claim to have the receipts accompany the notes ; and that it was not material that the relation of assignor and assignee did not immediately exist between the tradesman and the plaintiffs.

Statement.

THIS action was brought by the liquidators of the Central Bank of Canada, which was in course of liquidation and being wound up under the Winding-up Act, against Nicholas Garland, assignee for the benefit of creditors of one C. L. Van Wormer.

The statement of claim set forth that the plaintiffs were the *bonâ fide* holders for value of a large number of promissory notes discounted with the plaintiffs in the ordinary course of business by C. L. Van Wormer, who carried on business as a dealer in household furniture and effects ; that the notes were made by customers of Van Wormer, and were given for the price of goods sold by Van Wormer to them on the instalment or weekly payment plan, in pursuance of which Van Wormer gave to the purchasers thereof possession of the goods, and they executed and delivered to him hire receipts or instruments for the purpose of further securing the due payment of the price of the goods, in the following form :—

In case of removal I agree to report to this office

Goods No. 188 Statement.

I hereby rent from C. L. Van Wormer, of Toronto, the goods enumerated in the margin hereof for months at the rental of dollars, to be paid in monthly payments of dollars each, in advance, the first of said payments to be made on the day of , 188 , with interest at the rate of per cent. per month on the amount from time to time remaining unpaid. The said lessor or his agent to have the privilege of entering the premises and taking possession of said goods at any time during the day or night without notice.

Total \$

WITNESS:

If all payments of rent made promptly as per this lease, the goods to become the property of the lessee at the expiration thereof, otherwise to remain the property of the lessor.

N.B.—Read this contract. Verbal agreement with agents not recognized.

The plaintiffs by their statement of claim further alleged that they knew of these circumstances when they discounted the notes, and permitted Van Wormer to retain, and he did retain, possession of the leases in order to facilitate the collection of the moneys payable by his customers in respect of the notes for and on behalf of the plaintiffs, and upon the express agreement and understanding that the moneys so received by him should be paid to them on account of the respective notes; that on the 31st January, 1889, Van Wormer assigned his estate and effects to the defendant for the general benefit of his creditors, and the defendant took possession of the estate, including the leases, and collected moneys that should have been paid to the plaintiffs, and refused to pay over such moneys or to deliver up the leases, &c.

The plaintiffs claimed that the defendant should be ordered to deliver up all the leases made by customers of Van Wormer whose promissory notes were held by the

Statement. plaintiffs and unpaid, and to pay over all moneys received on such leases, and damages, &c.

The defendant by his statement of defence alleged that he had no interest in the matter except as assignee of Van Wormer; that Van Wormer did not discount the notes in question with the plaintiffs, and did not make any agreement or arrangement with the plaintiffs in respect to the leases; that the defendant as assignee took possession of a large number of hire receipts or leases which were in the possession of Van Wormer; that the plaintiffs never acquired any right, property, or interest in the hire receipts or leases, but the same always remained in Van Wormer until the time of the assignment, and that Van Wormer up to that time always collected and received the moneys payable to him under the terms of the documents, and retained and applied the same to his own use and benefit, and that there was no special application made by Van Wormer of the moneys collected upon the leases, and no agreement with Van Wormer therefor; that the notes held by the plaintiffs did not represent amounts that were at the time payable by the makers to Van Wormer under the terms of the leases, but included much larger sums than were payable under the leases, and were purely accommodation to Van Wormer, as was known to the plaintiffs.

The action was tried before FALCONBRIDGE, J., without a jury at Toronto on the 20th December, 1889.

The evidence shewed that the notes in question were indorsed by Van Wormer and then by one George H. Stephenson, who discounted them with the plaintiffs, having arranged for a line of discount with A. A. Allen, the plaintiffs' cashier.

The facts further appear in the judgments.

W. R. Meredith, Q. C., for the plaintiffs.

Watson, Q. C., and *Masten*, for the defendant.

June 2, 1890. FALCONBRIDGE, J.:—

Judgment.

Falconbridge,
J.

The rule that where the assignor has collateral securities for the debt which he assigns, the assignee will be entitled to the benefit of such securities unless it is otherwise agreed between the parties, cannot be invoked in the plaintiffs' favour in this case, for the reason that Van Wormer and the bank do not stand in the position of assignor and assignee. The account was Stephenson's and the line of credit was Stephenson's. Allen was not examined, and we have only Van Wormer's and Stephenson's account of the transaction. Plaintiffs have failed to show any right to possession of the leases created by contract, and Van Wormer was not the direct customer of the bank, and it was not he who discounted or deposited the paper in the bank. Stephenson did it all, and he was, as Van Wormer says, practically Van Wormer's banker. Stephenson was to get twelve per cent., and he says Allen knew it. Stephenson paid the bank seven per cent. Neither Allen nor Stephenson ever asked for the leases. Van Wormer was under no arrangement to account for his collections. He is plaintiffs' witness, and he says Stephenson knew of his, Van Wormer's, transactions with his customers, and that many of the notes were in whole or in part accommodation paper.

My judgment must be for defendant with costs.

The plaintiffs appealed from this judgment, and their appeal was argued before a Divisional Court composed of BOYD, C., and FERGUSON, J., on the 8th September, 1890.

W. R. Meredith, Q. C., for the plaintiffs. The evidence shews that the notes are connected with the hire receipts. These securities should accompany the notes. I refer to *Colebrooke on Collateral Securities*, section 79; *Story's Eq. Jur.*, 12th ed., section 1047a; *Morley v. Morley*, 25 Beav. 253; *Martin v. Mowlin*, 2 Burr. 969; *Cole v. Bank*

Argument. *of Montreal*, 39 U. C. R. 54; Washburn on Real Property, 5th ed., vol. 2, p. 97.

Watson, Q.C., for the defendant. The leases or hire receipts were severed from the notes by the consent of the bank. The notes were accommodation notes made by the lessees, and not to be paid to the bank by the makers, as the cashier knew.

Masten, on the same side, referred to *Auston v. Boulton*, 16 C. P. 318; *Phelps v. Comber*, 29 Ch. D. 813; *Brown v. Kough*, *ib.* 848; *Grant v. La Banque Nationale*, 9 O. R. 411; *Bank of Toronto v. Perkins*, 8 S. C. R. 603.

October 18, 1890. BOYD, C. :—

Van Wormer, dealing on the weekly payment system, sold goods to customers, taking hire receipts by which the goods remained in Van Wormer till full payment was made. These customers gave Van Wormer promissory notes for the amount of their purchases, which were discounted for Van Wormer, through the medium of one Stephenson, by the Central Bank. The bank is in liquidation, and now sues the assignee for creditors of Van Wormer to recover these hire receipts or their proceeds in the defendant's hands. The trial Judge dismissed the action, because, as he found, the relation of assignor and assignee *quoad* these securities did not exist between the bank and Van Wormer, because he was not the direct customer of the bank, and no express contract existed as to these hire receipts. It does not seem to me a material circumstance that the negotiation was with Stephenson as to the discounts. What was discounted was negotiable paper made by the customers payable to Van Wormer. These indorsed by Stephenson were by him discounted for Van Wormer's benefit by the bank, who were made aware of the course of dealing and the securities held by Van Wormer, when the line of discount was opened. To the bank therefore are liable not only Stephenson but Van Wormer and the customers of Van Wormer. Now the liability, whether on the footing of the

notes or the hire receipts, is the same so far as the customers are concerned.

Judgment.

Boyd, C.

If the bank sued the customers on the notes, effectual recovery could not be had till the hire receipts were forthcoming on which these parties are also liable. So *vice versa* Garland holding these hire receipts could not effectually enforce them in the absence of the promissory notes. Now, as between the parties litigant and the customers, the claim of the bank is preferable. The bank has given value for the notes and is entitled to collect them as representing the debt due by the parties to the notes, which is the principal thing. These hire receipts held by Garland are but securities which are accessory to the debt. As between these parties there is no right, as there was no agreement, to separate the two things, and in equity the transfer of the notes to the bank was a transfer of these securities. Garland is in no higher or better position than Van Wormer, and he, Van Wormer, could not resist the claim of the bank to have the receipts accompany the notes : *Walker v. Jones*, L. R. 1 P. C. 50; *Duchess of Buccleuch v. Hoare*, 4 Mad. at p. 476. The maxim *omne accessorium cedit principali* covers this case, as I think. Many other illustrations, of which some are in point, will be found collected in section 144 of Colebrooke on Collateral Securities, and in sections 79 and 155.

Judgment should therefore be entered, with costs, for the bank.

FERGUSON, J., concurred.

G. A. R.

[CHANCERY DIVISION].

WOOD ET AL. V. STRINGER ET AL.

Mechanics' lien—Ascertainment of amount due to contractor—Parties—Registered owner not liable on contract—Work and labour—Acceptance of bad work—Congregation occupying church—Reduction of price for bad work—Measure of—Extras—Written order for.

In an action to enforce a mechanics' lien, brought by material men against the contractor and the registered owner, the contest was as to whether anything was due to the contractor, the registered owner not being liable on the contract :—

Held, that the amount due to the contractor could not be ascertained without the persons liable on the contract being brought before the Court. The work in question was the building of a church. The last of the work done was the pews, and as they were being put in objection was made by the architect to their material and workmanship :—

Held, that the occupying of the church with the pews objected to in it was not an acceptance of the work :—

Held, also, that a reduction of the contract price by an amount equal to the difference in value between the bad material and that which should have been used was not an adequate measure of the set-off to which the proprietors were entitled.

The contract provided that no extras were to be allowed unless expressly ordered, and payments for the same expressly agreed for in writing by the proprietors or architects :—

Held, that extras could not be allowed unless a writing was proved.

Statement.

THIS was a summary proceeding to enforce a mechanics' lien, taken under the "Act to simplify the Procedure for enforcing Mechanics' Liens," 53 Vic. ch. 37 (O).

The plaintiffs were manufacturers, and furnished to the defendant Stringer materials for use in building a church on the west side of Parliament street, in the city of Toronto. The defendant Stringer was the contractor for the building, and the defendant Colville was the registered owner, and was as such made a defendant; but Stringer's contract was with the trustees of the church, who were not parties to the action.

The work of the contractor was done under the superintendence of an architect, Mr. Knox, and of his partner, Mr. Jarvis.

The contract provided that no extras were to be allowed unless expressly ordered, and payments for the same expressly agreed for in writing by the proprietors or architects

The Master in Ordinary, before whom the proceedings ^{Statement.} were carried on, pursuant to the Act of 1890, made his report on the 24th June, 1890, setting forth that the plaintiffs had filed with him a statement of claim, verified by affidavit; that he had thereupon issued a certificate in the terms mentioned in the statute; that a notice disputing the plaintiffs' lien was filed by the defendant Colville; but that no defence was filed by the other defendant, though duly notified; and he found that the plaintiffs were entitled to \$190.70, and \$5.00 for the costs of registering their lien; and that there was \$199 still due to the contractor, \$76 under the contract (the price having been \$1,300, and \$1,224 having been paid), and the balance for extras; and that the plaintiffs were entitled in respect of their lien to be paid by the defendant Colville \$195.70, and their costs, amounting to \$58.64, in all, \$254.34, which sum he directed should be paid into Court by the defendant Colville.

The defendant Colville appealed from the report on the following grounds:—

1. That no moneys were shewn to be payable by the defendant Colville to the defendant Stringer, and there was no liability on the part of the defendant Colville to pay for the work contracted to be done by the defendant Stringer.

2. That the contract under which the work was done was one entered into by the defendant Stringer with the South Side Presbyterian Church.

3. That the land was not subject to the lien of the plaintiffs.

4. That even if otherwise liable, the evidence shewed that the lien was not filed within the time and proceedings taken as by law required.

5. That the defendant Stringer did not complete his work as required by the terms of the contract, and was not entitled to claim payment of any balance that otherwise might be payable.

6. That no money was payable in respect of extra work,

Statement. as the same was not ordered or payment provided for by writing, as required by the terms of the contract.

7. That if the defendant Stringer was entitled to claim payment of the balance of the contract price and of the sum claimed for extra work, there should be deducted therefrom an amount sufficient to make good defective workmanship and materials, and to make the work comply with the terms of the contract.

8. That according to the terms of the contract, the architect was to determine any such matter and his decision was to be final.

9. That the Master had no power to direct payment by the defendant Colville.

The appeal was argued before BOYD, C., in Court, on the 25th of September, 1890.

James Reeve, Q. C., for the defendant Colville. The question is whether the plaintiffs have a lien, and this depends upon whether the defendant Colville was indebted to the defendant Stringer. The pews put into the church by Stringer were unfit for the purpose, and the Master finds they were not up to contract. The Master deducted the difference between the cost of the material actually put into the pews and the price which proper material would have cost. I submit that was not the proper method. The contractor could not claim anything at all for this work improperly done; a condition precedent to his right to recover would be to do his work properly. The owner would have a right to damages against the contractor for the loss of what he should have received. As to extras, no writing was shewn to justify their allowance. The Master found, however, that the extra work was done and accepted, and he therefore allowed for it. I submit that this was wrong, and that no extras should have been allowed. I refer to *Diamond v. McAnnany*, 16 C. P. 9; *Oldershaw v. Garner*, 38 U.C.R. 37; *O'Brien v. The Queen*, 4 S. C. R. at p. 549. There was no privity between Stringer and Colville, and it cannot be found that anything is due from Colville, and therefore the claim fails.

F. E. Hodgins, for the plaintiffs. Colville was treated as representing the owner. No personal order has been made against him, but merely a direction that he is to pay \$254.34 into Court. Colville is the "owner" within the meaning of sec. 2, sub-sec. 3, of R. S. O. ch. 126, and a necessary party: *Makins v. Robinson*, 6 O. R. 1; *Re Moorhouse and Leak*, 13 O. R. 290. If he is not the owner he should have retired from the contest or disclaimed. Apart from extras, one-tenth of the contract price, or \$130, should have been held back, and the plaintiffs, the only persons claiming a lien, would have been entitled to that: *Re Cornish*, 6 O. R. 259; secs. 9 and 10 of R. S. O. ch. 126. Then it is only necessary to shew \$69 more, due from the owner to the contractor. No deduction should be made on account of the pews; they were put in with the sanction of the architect, and accepted and used by the church. An order in writing for extras such as those in question here is not essential; many of them are not properly extras at all, but variations or deviations required for the proper carrying out of the plan, or they were things ordered as upon a separate contract and should be paid for. In any case a sub-contractor is not bound by a provision as to the settlement by the architect of accounts between the contractor and the owner: *Phillips on Mechanics' Liens*, sec. 58. If the contractor could not sue here, on account of the work not being properly completed, as argued, that does not interfere with the position of the material-man. When the work is substantially finished, with certain defects, a deduction for such defects from the contract price is the proper method of arriving at the amount due, and this was the method adopted by the Master.

Reeve, in reply. Notice was not given in time to arrest the payment over of ten per cent. of the contract price, and therefore the plaintiffs can claim only the amount actually due, which we say is nothing, because of the bad work on the pews, and because the claim to extras cannot be allowed: *Truax v. Dixon*, 17 O. R. 366. The only

Argument.

Argument. foundation of the right of the material-man is a debt due by the owner to the contractor ; and if there is no personal liability on the part of Colville, there is no right to a lien.

Hodgins asked leave to refer to 53 Vic. ch. 37, secs. 3, 4 ; *Phillips on Mechanics' Liens*, sec. 186 ; *Harrington v. Saunders*, 7 C. L. T. Occ. N. 88 ; *Petrie v. Hunter*, 2 O. R. 233.

September 30, 1890. **BOYD, C. :—**

I have read all the papers and evidence. The report cannot, I think, remain as it is. The plaintiffs can claim no more than is due from the persons liable on the contract for the erection of the church, and payable by them to the contractor. The accounts have not been taken as between these contracting parties, and Colville, in whom the title to the land is vested, is not shewn to be liable on the contract. Upon the contract the entire price payable to the contractor was \$1,300, and he has been paid \$1,224, leaving a balance of \$76 on the contract price. The work was completed, as he says, about 20th February, 1890, and the people or congregation occupied the church some days before. The last work done was the pews, and objection was made to the timber and workmanship, as they were being put in, by Mr. Knox. However, the church had to be occupied, and I do not think this should operate as an acceptance of this bad work. The evidence is plain that the material was inferior to and weaker than that required by the specifications. To replace in accordance with the bill of works would cost some \$185. There has been an outlay of some \$35 or \$40 necessary in order to strengthen the sittings and backs. The Master has allowed for this piece of bad work a reduction of \$25, which is said to be the difference in value between the bad stuff and the better material which should have been put in. That allowance can hardly be deemed an adequate measure of the set-off or deduction to which the proprietors are entitled.

Again, the contract provides that no extras are to be allowed unless expressly ordered and payment for the same expressly agreed for in writing by the proprietors or architects. No claim was made for extras by the contractor until a month after the building had been in use; he then put in a bill for extras amounting to \$253, but has proved no writing to warrant his recovery. These should all be disallowed on the present evidence. If the parties are content to let the matter rest on the footing of \$76 being due on the contract, and to have \$35 for repairs and \$25 for inferior lumber deducted (leaving thus a balance of \$16 for the plaintiffs), that may be so ordered without costs. If either party objects, the matter is referred back to the Master to take accounts with the persons liable on the contract with Stringer before the Court.

Judgment.

Boyd, C.

In the event of a reference back, it is not to be taken that I have assessed adequate damages in respect of the pews; but my suggestion is to end litigation, if possible. If either party seeks a reference back, the costs of this appeal and in the Master's office may be spoken to again.

G. A. B.

[CHANCERY DIVISION.]

RE TOWNSHIPS OF HARWICH AND RALEIGH.

Water and watercourses—Arbitration and award—Municipal corporations—Arbitration under sec. 590 of R. S. O. ch. 184—Constitution of board of arbitrators—"Interested," in s. 389, meaning of.

A question arose under sec. 590 of the Municipal Act, R. S. O. ch. 184, between the townships of H. and R., whether H. caused waters to flow on R. to the detriment of R. which ought to be drained from R. at the expense of H. The township of T. also discharged waters over the other side of R., opposite H. :—

Held, that T. was not "interested" within the meaning of sec. 389 of the Act ; and therefore that a board of three arbitrators appointed, pursuant to that section, one by each of the three municipalities, was not properly constituted to determine the question ; and their award was set aside.

Statement.

THIS was an appeal by the corporation of the township of Harwich from the award of three arbitrators upon a drainage arbitration under sec. 590 of the Municipal Act, R. S. O. ch. 184.

The arbitrators were appointed, one by the corporation of the township of Raleigh, who sought compensation from the township of Harwich, one by the corporation of the township of Harwich, and the third by the corporation of the township of Tilbury East, who claimed to be "interested" within the meaning of sec. 389 of the Act.

The appeal was upon the ground, among others, that the corporation of the township of Tilbury East was not "interested," and therefore that the board of arbitrators was improperly constituted, and the award was invalid.

The material parts of the sections of the Municipal Act bearing upon the point are as follows :

590.—* * * if any municipality * * * by any means causes waters to flow upon and injure the lands of another municipality * * * the municipality * * * causing waters to flow upon and injure such lands, may be assessed in such proportion and amount as may be ascertained by the engineer, surveyor, or arbitrators * * * for the construction and maintenance of such drain or

drains as may be necessary for conveying from such lands **Statement.**
the waters so caused to flow upon and injure the same.

388.—The two arbitrators appointed by or for the parties shall, * * appoint, in writing, a third arbitrator.

389.—In cases where more than two municipalities are interested, each of them shall appoint an arbitrator * *

The appeal was argued before BOYD, C., in Court on the 26th September, 1890.

M. Wilson, Q.C., for the appellants. A third arbitrator should have been appointed by the two arbitrators appointed by Harwich and Raleigh respectively: sections 388 and 390 of R. S. O. ch. 184. Tilbury East is not interested in the outlet of Harwich. Whatever is taken off Raleigh must be placed upon Harwich. I refer to *Re Dover and Chatham*, 12 S. C. R. at pp. 343, 350, 352.

Douglas, Q.C., for the township of Raleigh. Tilbury East, Raleigh, and Harwich all send waters through the Raleigh plains. The arbitration could not have proceeded in the absence of Tilbury East, and the burden being put upon Raleigh enures to the benefit of Harwich. The objection should have been raised at an earlier stage, not now that the evidence has all been taken and the award published: *Conmee v. Canadian Pacific R. W. Co.*, 16 O. R. 639.

W. R. Meredith, Q. C., on the same side. Where several municipalities are assessed for the same work, there should be one arbitration between all interested: *Re Essex and Rochester*, 42 U. C. R. 523. The assessment is for benefit as well as for outlet, and comes under secs. 585 and 590 of the Act. Raleigh's case is that Harwich's body of water, brought down by artificial means, flooded Raleigh's land.

Wilson, in reply. Under sec. 590 we have nothing to do with anything but our own water, in which Tilbury East is not interested. It is not a case of joint work as in *Re Essex and Rochester*, 42 U. C. R. 523. The assessment in that case under sec. 569 was for joint benefit and not for outlet. See *Beer v. Stroud*, 19 O. R. 10. Sec. 585

Argument. does not help Raleigh because the council have not taken any action : *Rose v. West Wawanosh*, 19 O. R. 294.

October 10, 1890. BOYD, C. :—

Re Essex and Rochester, 42 U. C. R. 523, is relied on to support the award in this made by the majority of a board constituted of three arbitrators appointed, one for Harwich, the appealing municipality, one for Raleigh, the respondent township, which initiated the drainage work in question, and one for Tilbury, which claims to be "interested" within the meaning of section 389 of the Municipal Act (R. S. O.). That case is thus adverted to by Burton, J.A., in *Dover v. Chatham*, 11 A. R. 259 : "In the case of *Essex v. Rochester* there were several municipalities interested, and the main question was whether, in the event of an arbitration being necessary, it was not necessary that all the municipalities interested should be parties, inasmuch as a reduction of the amount might result in increased burdens upon the others. It is not necessary to express any opinion upon that point." Not incidentally, however, an opinion does appear to be expressed upon this point by Gwynne, J., in *Re Dover and Chatham*, in the Supreme Court, 12 S.C. R. at pp. 355 and 358 (in whose judgment the majority of the Court agreed), which is adverse to any such shifting of burden from one to another of the municipalities adjoining the one which originates the work. The bulk sum for the whole work in such cases is borne by the initiating municipality, and the others contribute only so much as represents the actual benefit received by them which can be fairly attributable to the work. If benefit is disproved, the attempted charge fails entirely, and does not reappear to be imposed elsewhere. This, I conceive to be the true principle applicable in the present case. The question arises under section 590 of the Act between Raleigh and Harwich, whether Harwich causes water to flow on Raleigh to the detriment of the latter municipality, which ought to be drained from Raleigh at the expense of Harwich. This

question is single; and because Tilbury may also discharge waters over the side of Raleigh, opposite Harwich, that does not give such an interest as links these three in a common arbitration. The matter in dispute as to the *quantum* to be paid by Harwich, or whether any detriment arises, is to be adjusted by a board constituted by two arbitrators, one appointed by each municipality, Harwich and Raleigh, with a third appointed by these two, as in section 388 of the Act.

Judgment.
Boyd, C.

That is all that is needful to dispose of the appeal. The whole inquiry seems to be nugatory, in my opinion, because it has not been submitted to a properly constituted tribunal, as provided by the statute.

The appeal is allowed with costs.

G. A. B.

[QUEEN'S BENCH DIVISION.]

KENT ET AL. V. KENT.

Husband and wife—Conveyance of land to wife directly—Devise of land by wife—Tenancy by the curtesy—Adverse possession—Statute of Limitations—Infants—R. S. O. ch. 111, sec. 43—Devise of land conveyed to married woman by strangers.

A conveyance of land from a husband to his wife directly was made in 1870, was expressed to be in consideration of "respect and of one dollar," was in the usual statutory short form, and was duly registered. The marriage was in 1854 :—

Held, that the lands passed by the conveyance to the wife as her separate property.

The wife died in 1872, having made a will leaving her real estate to her two daughters, then aged respectively seventeen and twelve. The father remained in sole possession from the mother's death till his own death in 1890. This action was begun in 1890 by the younger daughter and the son of the elder to recover possession from the devisee of the husband :—

Held, that the husband had no title by the curtesy, because he was excluded by the devise to the daughters of the lands conveyed by him to his wife; he was therefore not rightfully in possession as against the daughters; and, as the younger daughter had by R. S. O. ch. 111, sec. 43, only five years after coming of age to begin proceedings, the action was barred as to these lands.

Other lands were conveyed to the wife by strangers in 1867 and 1869, of which the husband also remained in possession after her death :—

Held, that the devise of these lands by her did not affect the right of her husband as tenant by the curtesy, and his possession was in that character; and therefore as to these lands the action was not barred.

Statement.

ON 16th November, 1870, Charles W. Kent, being seised in fee of lots 7 and 8, part of the lands in question in this action, executed a conveyance of them to his then wife, Catharine Kent, in fee simple. The conveyance was expressed to be in consideration of "respect and of one dollar." It was in the usual statutory short form, and was duly registered.

On 8th May, 1867, Catharine Kent became owner in fee of lot 3, another part of the lands in question, by conveyance from one John Kent to her.

On 1st February, 1869, she became owner in fee of lot 2, another part of the lands in question, by conveyance from one Loveless.

Catharine Kent and Charles W. Kent were married on 10th April, 1854, without any marriage settlement.

Catharine Kent died on 7th June, 1872, leaving a will ^{Statement.} by which she devised all her real estate to her children, Margaret Caroline Kent and Catharine Amelia Kent ; and left her husband surviving her.

Margaret Caroline Kent was seventeen years of age when her mother died, and she married one R. H. Butt on 11th November, 1875, and died intestate in June, 1886, leaving her surviving her husband and one child, Henry H. Butt.

Catharine Amelia Kent was twelve years old when her mother died, and attained her majority in 1881.

After the death of his first wife, Charles W. Kent married the defendant, and remained in sole possession of the lands in question until he died in January, 1890, leaving her surviving and having by his last will devised to her all his property.

This action was brought in May, 1890, by Catharine Amelia Kent and Henry H. Butt, against the widow of Charles W. Kent, for a declaration that they were owners in fee of the lands in question, to recover possession, and for an account of rents and profits, &c.

The defendant set up that Charles W. Kent was owner in fee at the time of his death of lots 7 and 8, by reason of the invalidity of the conveyance from him to Catharine Kent, his wife, and by length of possession ; and of lots 2 and 3 by length of possession.

The action was tried before BOYD, C., at the London Chancery Sittings, on the 9th October, 1890.

The argument was heard at the conclusion of the evidence.

Gibbons, Q. C., and *George McNab*, for the plaintiff. The conveyance by the husband to the wife and the other conveyances to the wife vested the lands in her as her separate property. We refer to *Jones v. McGrath*, 15 O.R. 189 ; 16 O. R. 617 ; *Whitehead v. Whitehead*, 14 O. R. 621 ;

Argument. *Davisson v. Sage*, 20 Gr. 115; *Till v. Till*, 15 O. R. 133; *Glass v. Burt*, 8 O. R. 391. Even if the husband's possession since the wife's death has been adverse, the statute has not run against the plaintiff Catharine Amelia Kent, who did not come of age till 1881. But the possession was not adverse to the plaintiffs; Charles W. Kent was in possession as tenant by the curtesy. All the lands were acquired by the married woman before 1872, and therefore they were subject to her husband's tenancy by the curtesy although disposed of by her will: *Armour on Titles*, p. 150; *Furness v. Mitchell*, 3 A. R. 510.

W. R. Meredith, Q. C., and *E. R. Cameron*, for the defendant. The Married Woman's Property Act has not altered the old common law relation between husband and wife: *Re Jupp*, 39 Ch. D. 148. If the husband makes himself a trustee of the property for the separate use of the wife, he has no tenancy by the curtesy if she parts with the property either by will or by deed *inter vivos*: *Lewin on Trusts*, 8th ed., p. 735; *Cooper v. Macdonald*, 7 Ch. D. 288. If then the husband had no tenancy by the curtesy, he was a trespasser from the death of his wife in 1872, and acquired a title under the Statute of Limitations. A child has only five years after majority to bring action: *R. S. O. ch. 111, sec. 43*. There was no seisin of the wife in fact that would give a title by the curtesy to the husband, as the wife was never in fact in possession of lots 2 and 3.

Gibbons, in reply. The husband's possession of the wife's property is seisin in fact for the wife: *Weaver v. Burgess*, 22 C. P. 104. The Act of 1872 did not apply to the wife; it was that Act which contained the special provision as to tenancy by the curtesy, varying the common law rule.

October 18, 1890. **BOYD, C.:**—

The question is presented as to the effect of a conveyance of land from husband to wife directly, which is expressed to be in consideration of "respect and of one dollar."

Judgment.

Boyd, C.

The deed, dated in November, 1870, and duly registered, is in the usual statutory short form. The marriage was in April, 1854. The wife died in 1872, having made a will devising her real estate to two children (girls). The husband died in January, 1890, leaving his property to a second wife. This action is between plaintiff, claiming under the wife, and defendant, claiming under the husband. Until the decision of *Re Breton*, 17 Ch. D. 416, by Hall, V.-C., it may be said that the decided weight of authority in England was in favour of giving effect to such a transaction as the present. The precise question between husband and wife upon a direct conveyance from one to the other was settled, so far as Courts of first instance are concerned, by *Baddeley v. Baddeley*, 9 Ch. D. 113 (Malins, V.-C.), and *Fox v. Hawks*, 13 Ch. D. 822 (Bacon, V.-C.) *Re Breton*, 17 Ch. D. 416, though not a case of conveyance of land, questions these other two and assumes to treat *Grant v. Grant*, 34 Beav. 623, as no longer of authority because of what is to be found in the judgment of Turner, L. J., in *Milroy v. Lord*, 4 D. F. & J. 264, and adopted by Jessel, M. R., in *Richards v. Delbridge*, L. R. 18 Eq. 11. But it appears to me that *Milroy v. Lord* does not necessarily govern cases of husband and wife (which is, however, assumed by Hall, V.-C.), and in making this distinction, I follow an observation to the same effect by Spragge, C. J., in *Re Murray*, 9 A. R. at pp. 374-5. There is reason for upholding cases of benefaction between husband and wife where the instrument of transfer, being complete and apt for the purpose, fails of full effect only because of the legal and technical unity of giver and taker, which does not exist as between strangers or others not so related, when the gift or transfer is found to be inherently imperfect or incomplete.

The rule in equity which recognizes such dealings had its origin in *Mitchell v. Mitchell*, Bunb. 207, note, where the Court of Exchequer in 1712 held good in equity a gift which the husband had made to his wife after marriage without the intervention of trustees. This case is referred to in Mr. Kenny's treatise, p. 102, as marking a rever-

Judgment.
Boyd, C.

sal of the policy which England had borrowed from Rome five hundred years before. In *Lucas v. Lucas*, 1 Atk. 271, Lord Hardwicke said, in 1735, that gifts between husband and wife have often been supported though the law does not allow the property to pass. After the decision in *Re Breton*, Bacon, V.-C., adverted to the subject in *Re Whitaker*, 21 Ch. D. at p. 662, and says, "the law stands clearly established that a husband may, no doubt, constitute himself a trustee for his wife of any property whatsoever, hers or his, or any thing else that he has a right to deal with; but in order to do that there must be some proof furnished of a clear unequivocal determination and intention of the testator so to constitute himself a trustee. That cannot be reasonably implied from any circumstances which are not pregnant and distinct in themselves nor without some plain statement on the part of the husband." In the case in hand these requisites are combined; there is the plain statement on the part of the husband expressed in the conveyance to his wife that it is to be for her use and enjoyment, free from his claims, and there is the pregnant fact that such a deed is executed and registered with all due formality.

The language I have cited from Bacon, V.-C., is only an expansion of the principle more tersely put by Lord Alvanley thus, that there must be a clear and distinct act of the husband by which he engaged to hold as a trustee for the separate use of his wife. See *Walter v. Hodge*, 1 Wils. Ch. Cas. at p. 453, and counsel *arguendo* admit that the execution of a deed of the subject matter of the husband to the wife would be an act clear and distinct. That is accurately the point of decision in *Fox v. Hawks*, 13 Ch. D. at p. 832, the Vice-Chancellor saying, "he (the husband) relinquished all beneficial interest in the property, and, according to the doctrine now well established in this Court, a husband may, under such circumstances, become a trustee for his wife, but cannot retain any such beneficial interest in the thing which is the subject of the deed."

But the same matter was decided in 1873 by Strong, V.-C., upon the same grounds, before either of the English cases

upon which I have spoken, in *Davisson v. Sage*, 20 Gr. 115 ; and again the majority of the Court in 1881 held in the case of a voluntary conveyance from husband to wife, that he should not be allowed to say that he did not thereby make it the separate property of the wife : per Wilson, C.J., with whom agreed Galt, J., in *O'Doherty v. Ontario Bank*, 32 C. P. at p. 299. The case of *Whitehead v. Whitehead*, decided by Proudfoot, J., in 14 O. R. 621, is not distinguishable from the present, which was decided in favour of the wife. That case has been approved of by the Chancery Divisional Court in *Jones v. McGrath*, 15 O.R. 189; 16 O.R. 617.

Judgment.
Boyd, C.

The only notable point of distinction between the English cases in accord with *Davisson v. Sage* and the present, is that special words appeared in the conveyances importing an exclusion of the husband's interests and intending sole and separate enjoyment on the part of the wife. That, however, I judge to be not a material element of the case, where the husband himself conveys directly to the wife and uses the statutory form of conveyance. The covenants therein found in their extended meaning shew that the wife is to have the possession and rents to her own use without let or claim on the part of the husband, and that all the husband's right to the interest, claim, and demand upon the lands are released to her. The intention is thus manifested clearly and unequivocally that the property is to be for her use, which excludes his enjoyment as the grantor. Here, again, I would mark the distinction which obtains between incomplete voluntary gifts, properly so called, and those between husband and wife. So far as form and substance go, that which would be good at law if made to a stranger, is good in equity if made by husband to wife. See result of American decisions summed up in Bispham's Equity, 4th ed., sec. 99.

Before the death of the wife, in 1872, the husband would have no title by the curtesy, because he was excluded by the devise of this land to the two daughters, according to the doctrine of *Cooper v. Macdonald*, 7 Ch. D. 288. At that time the eldest daughter, Margaret, was seventeen years of age, and she married one Butt in November, 1875, when she was twenty years of age, and died intestate in June,

Judgment. 1886, leaving an infant, who is one of the plaintiffs. The
Boyd, C, younger daughter was twelve years of age at her mother's death, and attained her majority in 1881. The father remained in sole possession until the bringing of this action in May, 1890. Now, if the father was not tenant by the curtesy, he was not rightfully in possession as against the wife's devisees. The married daughter, Margaret, came of age in 1876, and her disability through coverture being then removed, she had a right of entry on the 1st of July, 1876: *Cameron v. Walker*, 19 O. R. at p. 220. The other daughter had, by R. S. O. ch. 111, sec. 43, five years after the removal of disability occasioned by infancy to begin proceedings, and this time would expire in 1886. As to these parcels of land, the action would appear to be barred.

Whatever relation existed between husband and wife as to these lands after the conveyance of November, 1870, there was no express trusteeship existing thereafter in the father, *quoad* the devisees of his wife. Even if the dry legal estate was in him, that gave no right to the possession of the property, and I cannot regard his occupancy as other than adverse to the present claimants.

As to these lands, the plaintiffs fail. But there were two other lots conveyed by strangers to the mother of the plaintiffs in 1867 and 1869, which, under the "Married Woman's Act," the wife was entitled to enjoy free from the control of her husband. These she could devise, but not so as to affect the right of her husband as tenant by the curtesy: *Cameron v. Walker*, 19 O. R. at p. 219. The possession of them by the husband after the wife's death was in this character of tenant by the curtesy, and the statute has not run against the plaintiffs.

As to these, judgment should be in plaintiffs' favour as prayed. Success being divided, it is better to give no costs to either side.

[An appeal from this decision, so far as it related to the lands conveyed by Charles W. Kent to his wife, was argued before the Divisional Court on the 27th November, 1890. Judgment was reserved.]

[CHANCERY DIVISION.]

SMITH V. BROWN ET AL.

Mortgagor and mortgagee—Sale under power—Notice of sale—Demand of payment within a month—Advertising sale during the month—Injunction—R. S. O. ch. 102, sec. 30.

An advertisement for sale of lands is a "proceeding" within the meaning of the words "no further proceedings" in sec. 30 of R. S. O. ch. 102. Where a mortgagee served upon the mortgagor a notice demanding payment of the mortgage money, and stating that unless payment were made within a month from the service, the mortgagee would proceed to sell, an injunction was granted restraining the mortgagee from publishing, until after the expiry of the month, an advertisement of the sale of the mortgaged premises.

THE plaintiff mortgaged certain land to the defendant **Statement.** Brown, and the mortgage deed contained a power of sale, on default for one month, on one month's notice.

The mortgage being in default, the defendant Brown on the 23rd October, 1890, served a notice on the plaintiff demanding payment of the sum of \$2,906.02 and interest, and notifying the plaintiff that unless payment were made within one month from the time of service, the defendant would proceed to enter into possession of the mortgaged premises and take the rents and profits and to sell the lands, &c.

The defendant Brown on the 5th November, 1890, caused to be published an advertisement in the *Evening Telegram* a newspaper published in the city of Toronto, announcing that the mortgaged land would be offered for sale by public auction on the 29th November, 1890. No order permitting the publication had been obtained.

The mortgagor then began this action for damages for the publication of such advertisement and for an injunction to restrain the defendant Brown, the mortgagee, and the defendant Robertson, the owner of the newspaper, from publishing it again.

An interim injunction was granted by GALT, C. J., upon the *ex parte* application of the plaintiff, on the 11th Novem-

Statement. ber, 1890, and on the 18th November, 1890, the plaintiff moved to continue it till the trial.

The motion came on before FERGUSON, J., in Court.

A. Abbott, for the plaintiff. R. S. O. ch. 102, sec. 30,* forbids proceedings until after the lapse of the time fixed by the notice. The publication of an advertisement is a "proceeding." The defendants should be restrained from publishing the advertisement until after the lapse of a month from service of the notice, that is, until the 24th November, 1890.

J. A. Paterson, for the defendants. The statute is not aimed at such a proceeding as advertising the mortgaged land for sale. Even if it were, the enactment is to prevent the making of unnecessary and vexatious costs, and the question would be merely whether the plaintiff could be charged with the costs of the advertisement. It is not a case for an injunction.

Judgment was given at the conclusion of the argument.

FERGUSON, J.:—

I am of the opinion that the advertisement complained of is a proceeding within the meaning of the words "no

*30 (1) In order to prevent the making of unnecessary and vexatious costs in respect to mortgages, it is hereby enacted that, where pursuant to any condition or proviso contained in a mortgage there has been made or given a demand or notice either requiring payment of the moneys or any part thereof secured by such mortgage, or declaring an intention to proceed under and exercise the power of sale contained in such mortgage, no further proceedings, and no action either to enforce such mortgage, or with respect to any clause, covenant, or provision therein contained, or the lands or any part thereof thereby mortgaged, shall, until after the lapse of the time at or after which, according to such demand or notice, payment of the moneys is to be made, or the power of sale is to be exercised or proceeded under, be commenced or taken unless and until an order permitting the same shall first be had and obtained either from the Judge of a County Court or from a Judge of the High Court.

further proceedings" in sec. 30 of R. S. O. ch. 102, and Judgment. that, under the circumstances of the case, it is a proceed- Ferguson, J. ing that is forbidden by that section. I think the order for the injunction was rightly made, for anything that appears here. The order should, I think, be continued as asked till the 24th November.

[Upon consent of the defendants judgment in the action was pronounced continuing the injunction till the 24th November, and the defendants were ordered to pay the costs of the action].

G. A. B.

[CHANCERY DIVISION.]

HALL V. HALL ET AL.

Donatio mortis causa—Delivery of keys of box and rooms containing valuables.

Shortly before his death the plaintiff's uncle delivered to her his watch and pocket-book, and also the keys of his cash box, which was then in the actual possession of his solicitor, and of two rooms, in which were contained securities for money and chattels, accompanying the delivery with words of gift:—

Held, upon the evidence, that the deceased intended to give to the plaintiff what the keys placed in her control, and to part with the possession and dominion of the cash box and its contents, and of the rooms and their contents; and upon the law, that the intention of the deceased should be given effect to, and a valid *donatio mortis causa* declared.

Statement.

THIS action was brought by Fanny Hall against Esther Hall and William Hall, the administrators of the estate of Joseph Hall, deceased, who died intestate on February 1st, 1890. The plaintiff was a daughter of the defendant William Hall, and a niece of Joseph Hall.

The statement of claim alleged that prior to his decease Joseph Hall was seriously ill at the house of the defendant William Hall, and the plaintiff nursed and attended him during such illness; that shortly before his death, and in present fear of death, Joseph Hall gave to the plaintiff certain promissory notes and money, and a certain cash box and the contents thereof, and the contents of two rooms in the village of Dunnville, of which the deceased was tenant, for her own sole and absolute use, and at the time of such gift delivered such notes and money and the keys of the cash box and rooms to the plaintiff; that the plaintiff delivered the money, notes, and keys to her father, the defendant William Hall, first informing him that she claimed the money, notes, and cash box, and contents of the cash box and rooms, as a gift to the deceased from herself; that the cash box was at the time of the death of Joseph Hall, and for some time prior thereto had been, in the possession of Mr. Snider, a solicitor at Dunnville; that the cash box and rooms contained promissory notes, mortgages, and certain chattels.

The plaintiff claimed to have it declared that she was ~~Statement.~~ the owner of the promissory notes, money, cash box, and contents of the cash box and rooms, as a *donatio mortis causa* from the deceased, and to have the same delivered and assigned to her.

The defendants by their statement of defence stated that they were not aware as to the truth of the facts alleged by the plaintiff; they submitted that the plaintiff had not made out any title to have the property delivered to her; and they submitted their rights to the Court.

The action was tried before ROSE, J., without a jury, at Cayuga, on October 23rd, 1890.

The plaintiff swore that on the Wednesday before Joseph Hall died she was in his room, and he said to her: "My keys, Fanny; I want you to take them." He then handed her his pocket-book from under his pillow, and said: "I want you to take them, Fanny; *I give them to you*; be sure you keep them; do not give them up; put them some place where you will know they are safe; you will need them." The plaintiff also swore that she had taken a friend, Mrs. Sarah Robinson, in to see the deceased; and he said to her that he was "very sick." The friend then said to the plaintiff: "He has failed fearfully since I saw him last." The plaintiff said: "Yes, I think he must realize it; he gave his keys and everything belonging to him to me yesterday, and told me to keep them."

In cross-examination the plaintiff said that the deceased had given her his watch on the day before, and that she had had possession of it ever since. He said: "My watch, Fanny, where is it?" She said, "Here it is," handing it to him—"Do you want it?" He said, "No, you keep it; be sure you take good care of it." The plaintiff also swore that nothing took place on the Wednesday prior to the conversation related; that he just spoke to her abruptly while she happened to be in the room; and that when he said, "My keys, Fanny," she took the keys out of his trousers.

Statement.

Mrs. Sarah Robinson swore to a conversation she had with the deceased in reference to the plaintiff in the summer before he died, in which she said to him that she hoped the plaintiff's father would do well for her, as she had given up a home of her own to make him comfortable; and the deceased answered that he hoped so, but he (the deceased) would see that she had plenty, independent of her father. The same witness swore to another conversation later in the same summer, in which the deceased said he did not think he would ever get better, and that he intended to settle his business and leave all to the plaintiff. The same witness also corroborated what the plaintiff swore to with reference to her, and in addition stated that on that occasion the plaintiff left the room of the deceased, and she (witness) remained. What followed, the witness described in these words: "Uncle Joe says: 'Fanny,' and I, not thinking it necessary to call her, I laid my hand on his head and said, 'Yes, Uncle Joe;' he said, '*Fanny, it is all yours*; be sure you keep it and do not let it out of your possession.' He opened his eyes then and looked at me, and I noticed that he noticed it was not Miss Hall, and I asked him if I should call her, and he said, 'No, not now.'"

Louis Congdon swore that the deceased had said to him that he intended to give his property to whoever took the best care of him when he needed it; that he had spoken in that way to him, probably half a dozen times during the last year of his life.

The case was argued at the conclusion of the evidence.

C. G. Snider, for the plaintiff.

Bicknell, for the defendants.

The authorities cited appear in the judgment.

November 8, 1890. ROSE, J.:—

From the evidence I conclude that the intestate intended to make gifts to the plaintiff; that in pursuance of

his intention, he gave her his watch, pocket-book and contents, and keys. Judgment.

Rose, J.

The case was dealt with as if the donation was *mortis causâ*. It was not urged that it might have been *inter vivos*.

Treating it as *mortis causâ*, I have no difficulty as to the pocket-book. The watch was not in question. The difficulty I have had was as to the contents of the box and the furniture in the room—the keys of which box and room were given to the plaintiff.

On the whole I have come to the conclusion that I should not be giving the effect intended by the intestate to his language when he gave the keys to the plaintiff, if I do not hold that he intended to give her what the keys placed in her control.

True, he might have sent to his solicitor and had the box brought and actually handed over, but it would have been an inconvenient thing to do, and such as one in his weak and nervous condition would hardly have thought of doing.

I find as a fact that the intestate intended to, and did in fact, part with both the possession and dominion of the box and its contents, and of the rooms and their contents, when he gave the keys to the plaintiff. In my opinion, he was dealing with the keys as he had done with the pocket-book and the watch, and the intention was the same as to all.

Is the plaintiff prevented by any decided case from maintaining her claim?

The cases are collected in the notes to *Ward v. Turner*, 1 W. & T. L. C., Bl. ed., p. 1059.

See also Williams on Executors, 8th ed., p. 780, and *McCabe v. Robertson*, 18 C. P. 471. The head-note to the latter case is quite misleading, as will appear from a reading of the judgment, especially at pp. 480-1. There was no holding as stated in the head-note. The case was sent down for a new trial to have determined the question of sufficient delivery. It was held that the instrument,

Judgment.

Rose, J.

if so delivered as to constitute a good *donatio mortis causæ*, would give the right to the defendants to recover the money, provided Mrs. McCabe could so pass the money.

The learned Chief Justice Richards said, at p. 481 : "The jury should be asked to find expressly whether this was a gift *inter vivos*, or in *mortis causæ*, and then, on their finding, the law may be settled by this Court, as far as we can do it."

In *Jones v. Selby*, Prec. Ch. 300, it was held that the delivery of the key of a trunk, with words of gift of the trunk and its contents, was a good delivery of a tally upon the government for £500 contained in the trunk. The words were, "I give to my cousin, Mrs. Wetherley, this hair trunk, and all that is contained in it," and the key was delivered to her. *The trunk was never removed from the place where it stood at first.*

Hawkins v. Blewitt, 2 Esp. 663, may be referred to as to the necessity of parting with the dominion over the articles claimed.

In *Smith v. Smith*, 2 Str. 955, a valid gift was held to have been made *mortis causæ* where the intestate had furniture and plate at the defendant's house, and had said that whatever he brought into the lodgings he never intended to take away, "but gave directly to the defendant's wife." The only act of delivery was that when the intestate went out of town he used to leave the key of his rooms with the defendant; and it was determined by the Lord Chief Justice, Sir Robert Raymond, that the possession was such a mixed possession that the law would adjudge it to be in him who had the right; and so it was determined in favour of the defendant.

The evidence in the present case certainly goes much farther than in *Smith v. Smith*.

In *Ward v. Turner*, reported in 2 Ves. Sr., p. 431, at p. 443 Lord Chancellor Hardwicke said: "It was never imagined, on that statute, that delivery of a mere symbol in the name of the thing, would be sufficient to take it out of that statute;" (21 Jac. 1) "yet, notwithstanding,

delivery of the key of bulky goods, where wines, &c., are, has been allowed as delivery of the possession, because it is the way of coming at the possession, or to make use of the thing; and, therefore, the key is not a symbol, which would not do.”

Judgment.

Rose, J.

I was asked by the defendants' counsel to carefully consider *Smith v. Smith*, in the light of *Burn v. Markham*, 7 Taunt. 224; but in the latter case the intestate kept the keys in his own custody near the bed, and so there was no delivery.

The facts in *Blain v. Terryberry*, 9 Gr. 286, are so different as to afford no guide in the present case. The claimant there was the executor, and the word “keep” was held not to mean to keep them as his own, but as executor.

I do not understand what the precise facts were in *Young v. Derenzy*, 26 Gr. 509, as all that is stated is that “the cash box and its contents appear to have remained as much in the custody and power of the husband after this verbal gift, as before;” and it was accordingly held that there had been no valid *donatio mortis causæ*.

Travis v. Travis, 12 A. R. 438, depends on its own facts, which were held not to shew any manual tradition or actual delivery.

I see nothing in any of these cases against the view that delivery of the keys of the box and of the room, if made with the intention to give the donee the possession and dominion over the articles which could be reached by means of the keys, was a delivery of the articles themselves.

I think, therefore, I am at liberty to give effect to what I believe to have been the intention of the intestate and the plaintiff, and to hold that on the evidence a valid *donatio mortis causæ* of all the articles claimed has been established.

These articles do not comprise the whole estate, and while I think the plaintiff is entitled to her costs, they, as well as the defendants' costs, may be paid out of the estate.

Judgment.

Rose, J.

In case there is not sufficient estate to pay the plaintiff's costs, she will be entitled to judgment against the defendants for payment of the deficiency, if she wishes to exact it, which probably she will not.

[An appeal from this decision is pending before the Divisional Court.]

G. A. B.

[CHANCERY DIVISION.]

SECOND V. TRUMM.

Lien—Mechanics' lien—Act for simplifying procedure—High Court and inferior Courts—Application of Act—53 Vict. ch. 37 (O.)

Held, that notwithstanding the apparently unlimited provisions of sec. 1, of 53 Vict. ch. 37 (O.), entitled an "Act to simplify the Procedure for enforcing Mechanics' Liens," the intention of the Act is to simplify such procedure in the High Court only, leaving the procedure provided for in County Courts and Division Courts unaffected by the passing of the Act.

Statement.

THIS was a motion by way of appeal from the certificate of the local Master at St. Catharines, and for an order setting aside another certificate issued by him, in connection with the proceedings in this action, which was brought under 53 Vict. ch. 37 (O.), entitled "An Act to simplify the Procedure for enforcing Mechanics' Liens."

The circumstances of the case are fully set out in the judgment.

The matter was argued before FERGUSON, J., in Chambers, on September 1st, 1890.

Cox, for the defendant appellant.

Aylesworth, Q. C., for the plaintiffs.

September 4th, 1890. FERGUSON, J. :—

Judgment.

Ferguson, J

This is a motion by way of appeal from the certificate of the local Master at St. Catharines of his findings, which certificate bears date the 8th day of August last, and for an order setting aside a certificate issued by him on the 11th day of July last,

The action is a proceeding under the provisions of the Act of the Legislature, passed during its last Session, being according to its title, "An Act to simplify the Procedure for enforcing 'Mechanics' Liens," 53 Vict. ch. 37 (O.), and was brought, and is in the County Court of the county of Lincoln.

The 40th and last section of this Act is: "This Act shall be read as part of the Mechanics' Lien Act, subject to the provisions of this Act," by which I understand that the Mechanics' Lien Act, ch. 126, R. S. O., 1887, so far as not repealed, and this Act are to be read together as the enactment respecting mechanics' liens.

The first section of this Act is: "Any person claiming a mechanic's lien, may enforce the same by means of the proceedings hereinafter set forth."

The second section provides that a plaintiff may without issuing a writ of summons or taking any other preliminary proceeding, file a statement of claim in the office of a Master or Official Referee having jurisdiction in the county wherein the lands in question are situate. By section three such statement of claim shall be verified by affidavit, and upon the filing of such statements of claim and affidavit, the Master or Referee shall issue a certificate in duplicate of the filing of the same; and section four provides that upon registration of such certificate in the proper registry office or land titles' office, the action shall be deemed to have been commenced as against the owner, and all other necessary parties to the action.

Section 28 of the Mechanics' Lien Act provides that where the amount of the claim in respect of any lien is within the jurisdiction of the County or Division Courts

Judgment. respectively, proceedings to recover the same according to the usual procedure of such Court by judgment and execution, may be taken in the proper Division Court or in the County Court of the county in which the land charged is situate.

Ferguson, J.

This section also provides for the taking of summary proceedings by summons and order before the Judge of such Courts.

In the present case the plaintiff's claim is \$119.31, and his proceedings are taken professedly under the Act of last Session, in the County Court.

From a perusal of the papers, it appears that the plaintiff, instead of drafting a statement of his claim referring therein to the land in respect of which he claims the lien, drafted form No. 6 in the schedule to the Act, which form is headed "Statement of *account* by lien holder," and adopted the form of affidavit in No. 7 of the same schedule, which is headed "Affidavit of lien holder, verifying *claim*."

The Master, however, on the 11th day of July, issued his certificate of the filing of the statement of claim which contains a description of the land, and is in form apparently all that is required by the Act. This also contains an appointment such as is provided for by the 5th section of the Act.

The certificate was duly registered, and the certificate and appointment served upon the defendant apparently in pursuance of the provisions of section 6 of the Act. On the 18th day of July, the defendant filed and served a notice disputing the plaintiff's claim and right to a lien. In this notice, it was amongst many other things asserted that the local Master had no jurisdiction to entertain the action; that the County Court had no jurisdiction to entertain it, and that the plaintiff's claim was improperly filed therein; also that the affidavit of claim filed was not sufficient. There was a hearing before the Master upon these so called preliminary objections, and his certificate obtained. From this certificate is this appeal.

Section 35 of the Act provides that "Orders and certificates made by a Referee or Master under the Act, shall be appealable in like manner as orders made in Chambers by a local Judge."

It does not appear that the statement of claim was objected to on the hearing before the Master, but only the affidavit verifying the same.

The Master overruled both the objections as to jurisdiction, and certified that in view of the facts disclosed, and that the delay in not bringing these "preliminary objections" up for argument before him sooner was caused by the defendant, and that the plaintiff in consequence of such delay was too late to begin proceedings *de novo*; he therefore gave the plaintiff leave to amend his statement of claim as he might be advised, and to file a new affidavit in verification thereof, providing for the service of the same, &c.

This certificate is, as before stated, dated the 8th day of August, and is the one appealed from.

As to the part of the motion that is to set aside, the certificate of the 11th day of July, I think it should be refused or dropped, as so far as I can see, I have not any power to set aside any proceeding in the County Court of the county of Lincoln.

As to the appeal, it was conceded by counsel on both sides that the questions are substantially two, namely: (1) Was there jurisdiction in the County Court? and (2) If so, had the Master power to allow the amendment as he did?

The Master or referee mentioned in the second section of the Act has, as I understand, jurisdiction as such officer in actions in the High Court only. It may, however, be said that the words are employed as descriptive of the person. If there were nothing more the matter might be considered not unequivocal.

Section 36, provides that the Act shall not in any way affect, alter, or diminish the jurisdiction or procedure in the County Court or Division Courts for enforcing mechanics

Judgment.
Ferguson, J. liens in a summary manner as provided by the 28th section of the Mechanics Lien Act, save in so far as sub-sec. 1 of sec. 30 is amended, and I do not see that this amendment affects the contention here. That 28th section provides a summary mode of enforcing mechanics' liens in proper cases in the County Courts and Division Courts, that is cases of the proper competency of these respective Courts, which I think would not be simplified by the adoption, if possible, of the proceedings provided for by the late Act instead thereof, and such summary mode of procedure is not in any way to be affected or altered by the passing of the late Act.

Again, assuming that one is at liberty to look at the forms appended to the Act it is found that in form No. 8, page 76, these words are used, "style of Court and cause," and in the body of the form "the Master of this Court at or W. X., Esq., an official referee of this Court at " which so far as I can see would not be applicable if the Court were a County Court or a Division Court.

Notwithstanding the apparently unlimited provision of the first section, I think a perusal of the whole Act leads fairly to the conclusion that the intention of the Legislature in passing it, was to simplify procedure in the High Court only for enforcing mechanics' liens, leaving the summary and simple procedure for that purpose before fully provided for in County Courts and Division Courts unaffected by the passing of the Act, and that there was not in this case the jurisdiction contended for.

The question of jurisdiction being answered in this way, it is, I think, unnecessary to answer or further refer to the other of the two questions mentioned above.

The position now seems peculiar. The defendant succeeds upon an appeal on the ground that there was not jurisdiction, when but for the provisions of section 35 of the late Act, there could not be any such appeal, and the provisions of that section would seem to apply only in cases where the jurisdiction existed.

Overlooking, however, all matters of this character, the defendant succeeds as to one part of this motion, and fails as to another part, and there should be no costs in respect of the motion. In any view, I would not be disposed to award costs, the Act being fresh and there being at least some grounds for reasonable doubt on the subject. Judgment.
Ferguson, J.

The appeal is allowed. The motion to set aside a proceeding refused for reasons given above. No costs to either party.

Order accordingly.

A. H. F. L.

[CHANCERY DIVISION.]

SMITH v. TENNANT.

Contract—Conveyance—Merger of contract in conveyance—Non-completion of houses by stipulated time—Measure of damages.

The defendant's assignee for creditors agreed with the plaintiff to exchange five houses then in course of erection for certain lands of the plaintiff. By the contract which was dated March 24th, the houses were to be completed by May 30th, similar to certain houses on O. street. Mutual conveyances were to be exchanged between the parties within sixty days, i.e., by May 24th, but as a matter of fact they were executed and exchanged about May 9th. The plaintiff subsequently in the present action claimed damages for non-completion of and defects in the finishing of the houses.

The deed from the defendant contained no covenants covering the matters complained of :—

Held, nevertheless, that the plaintiff was entitled to recover on the original contract.

A contract to perform work or to do things for the other contracting party on a sale of lands at a period after the time fixed by the same contract for the execution and final delivery of the formal conveyance, does not become merged in the conveyance.

Held, also, that the loss of rents which might have been obtained for the houses if completed at the proper time was a proper measure of damages, the contracting parties having known that the houses were intended to be rented.

Statement.

THIS was an appeal from the report of the Master in Ordinary in this action, made under the circumstances which are fully set out in the judgment of FERGUSON, J.

The appeal came on for argument on September 4th and 5th, 1890.

Moss, Q. C., and *Douglas*, for the defendants. There is no contract outside of the conveyances; *Joliffe v. Baker*, 11 Q. B. D. 225, gives the rule of law.

Howard, for the plaintiff. The agreement shews that the rule as to the conveyance being conclusive does not apply. On the contrary, I refer to *Dart on Vendor and Purchaser*, 6th ed., p. 904; *Newham v. May*, 13 Pr. 749; *Leuty v. Hillas*, 2 DeG. & J., 110; *Palmer v. Johnson*, 13 Q. B. D. 351; *Leggott v. Barrett*, 15 Ch. D. 306. The conduct of the parties shews how they understood the mat-

ter. On the question of compensation and damages, I refer to *Corbet v. Johnson*, 10 A. R. 554; *Hadley v. Baxendale*, 9 Ex. 341; *Griffin v. Colver*, 16 N. Y. 489; *Munsie v. Lindsay*, 10 P. R. 173, 11 O. R. 520, 525. All the plaintiff has to shew is, that he was kept out of possession for the time, and then he will be entitled to use and occupation for the same time.

Moss, in reply. I refer to Fry on Specific Performance, 2nd ed., p. 518, as to compensation. The plaintiff could not have been compelled to close, and accept the conveyance without compensation. He volunteered to take his conveyance without providing for what he now complains of by covenant or security, or by making a new agreement: *Lindley v. Lacey*, 17 C. B. N. S. 578; *Palmer v. Johnson*, 13 Q. B. D. at p. 357, *Mason v. Scott*, 22 Gr. 592. In *Palmer v. Johnson*, there was in the contract a special agreement as to compensation for things unforeseen. There the contract was kept alive. Here that is not so. In *Clayton v. Leech*, 41 Ch. D. 103, it was argued that *Palmer v. Johnson* had disturbed the authorities. See also, *Besley v. Besley*, 9 Ch. D. 103; *Joliffe v. Baker*, 11 Q. B. D. 255; *Leggott v. Barrett*, 15 Ch. D. 306; Sugden's Vendors and Purchasers, 14th ed., p. 169; *Monro v. Taylor*, 8 Ha. 51, 56; *Friedland v. McNeil*, 33 Mich. 40; *Munsie v. Lindsay*, 11 O. R. 520, is not at all applicable here.

October 4th, 1890. FERGUSON, J.:—

This is an appeal from the report of the Master in Ordinary.

The action is upon an agreement for the exchange of certain houses on Howard street and on Summer Hill Avenue, in the city of Toronto, for certain property in the village of Eglinton, in the township of York. One of the difficulties—I may say the chief one—has arisen in respect of five houses, those upon Summer Hill Avenue. These were by the agreement to be finished in a manner similar to certain houses on Ottawa street in the city situate near

Judgment. to them, and which were not themselves completed at the
Ferguson, J. time of the making of the contract. There was also another house on Davenport Place to be given in the exchange, but there is no difficulty as to this, nor, indeed, as to any of them except the five on Summer Hill Avenue. The properties seem to have been considered of large value, and each of the contracting parties was to assume a large sum in mortgages upon the properties he was getting. The agreement was between one E. G. Woodley and the plaintiff, Smith. The defendant, Tennant, is the assignee (for creditors) of Woodley.

By the terms of the contract which was made by way of offer and acceptance, the acceptance being dated March 25th, 1889, Woodley was to have until the 30th day of May, 1889, to complete the five houses on Summer Hill Avenue, he paying all charges, expenses, and outgoings in respect thereof until completed, and the contract provided that all deeds and transfers were to be completed and handed over "on or before" sixty days from the date of the acceptance of the offer. These sixty days expired on the 24th of May, yet Woodley had till May 30th to finish the five houses. For some reason, that does not appear, and which is perhaps not material, the parties long before the expiration of the sixty days, and on, I think, the 9th day of May, made an adjustment respecting taxes, interest, and insurances, and executed and delivered mutual conveyances of the respective properties. This appears to have been done in pursuance of, but not in precise accordance with the agreement. At this time the houses on Summer Hill Avenue were not completely finished, and Woodley continued the work upon them. He also continued it after the 24th, and after the 30th of May for a considerable period. The plaintiff amongst other things complains of the non-completion of and of inferior work and materials in the finishing of these houses, of long delay and default on the part of Woodley, and claims large damages.

The action was referred to the Master in Ordinary to

take the account between the parties with power to report Judgment. specially on any issue raised on the pleading. The report Ferguson, J. finds against the defendant the sum of \$986.37, this sum being chiefly, if not wholly, in respect of the manner of the finishing of these five houses, and damages for delay in the work of so doing, and against the plaintiff chiefly, if not wholly, in respect of the matters of or embraced in the adjustment before mentioned, the sum of \$207.37, shewing a balance in favor of the plaintiff of \$779. From this the defendant appeals. The plaintiff had also a cross-appeal which I thought was virtually abandoned or given up, and it was at the argument dismissed with costs.

The matters complained of by the plaintiff are not matters that are covered or embraced by any covenant or covenants contained in the conveyance given by the defendant to him. The plaintiff took no security from the defendant in regard to them or any of them at the time of the execution and delivery of the conveyances, or afterwards, nor was any new bargain or agreement at or after this time made in respect of them or any of them. The original agreement sued on does not contain any contract or promise in respect of compensation as such, but it does on its face clearly shew that Woodley one of the contracting parties was to complete these five houses after the time fixed by the agreement for the execution and delivery of the respective conveyances, that is to say, Woodley had till the 30th of May to do this, and the conveyances were to be delivered on a day not later than the 24th of May. They were in fact as already stated executed and delivered as early as the 9th of May.

Early in the argument counsel for the defendant placed a contention upon the rule stated in Dart on Vendors and Purchasers, ch. 14, sec. 8, and in many other books and cases, stating that as 'the conveyances had been executed by all necessary parties, there was no remedy at law or in equity in respect of defects either in the title to or in the quantity or quality of the estate, which were not covered by the covenants in the conveyance of it; claiming that

Judgment. the case fell under this rule, and was not excluded from the operation of the rule by reason of falsehood or fraud, or total absence of the subject matter of the contract, referring to *Joliffe v. Baker*, 11 Q. B. D. 255; *Clayton v. Leech*, 41 Ch. D. 103, and many other cases on the subject.

Ferguson, J.

The transaction here was an exchange of lands, and I apprehend the same rule would apply as in the case of a purchase and sale.

The rule invoked by defendant's counsel, is no doubt a well established rule. I need not refer to cases on the subject. They are numerous and well known. Apart, however, from the exceptions to the rule, which are based upon falsehood and fraud, or the absence of the subject matter of the supposed contract, there appear, from a perusal of the authorities, I think, to be some cases to which the rule does not apply, and there is perhaps not so great a diversity of decision on the subject as some of the statements found in the reported cases would seem to imply.

The case *Palmer v. Johnson*, 13 Q. B. D. 351, decides that where the conditions of sale provide that in case any error, misstatement, &c., in the particulars be discovered, this shall not annul the sale, but compensation shall be allowed. The purchaser was entitled to recover compensation, though the error complained of was not discovered till after conveyance executed. In this case reference is made to *Cann v. Cann*, 3 Sim. 447; *Bos v. Helsham*, L. R. 2 Ex. 72, and other prior cases.

In *Clayton v. Leech*, it was held that as the compensation claimed was in respect of a defect which might have been discovered before the lease was taken, and there was no contract as to compensation, the plaintiff was not entitled to compensation after taking it. In this case it is said that *Besley v. Besley*, 9 Ch. D. 103, is not overruled by *Palmer v. Johnson*, as *Palmer v. Johnson* turned upon an express agreement for compensation.

Lord Justice Bowen, in *Palmer v. Johnson*, says: "One must construe the preliminary contract by itself, and see whether it was intended to go on to any, and what extent

after the formal deed has been executed." The learned Judge then construes the 12th condition in that case, considering the question as to whether it was intended to cover only the interval before the formal deed of conveyance, and in so doing, refers to *Bos v. Helsham*, L. R. 2 Ex. 72, which, as his Lordship said, followed *Cunn v. Cunn*, decided as early as 1830. Ferguson, J.

In the present case there is no difficulty whatever in seeing that the preliminary contract was to "go on," (to use the words of that learned Judge) after the execution of the formal conveyances, for this appears in plain words upon the face of it, the defendant having till the 30th of May to complete the buildings according to the agreement; whereas the formal conveyances were by the same agreement to be executed and delivered at a day not later than the 24th of May.

A large number of United States cases seem to show that the articles of agreement for the sale of land, are generally merged in the deed, made, delivered, and accepted in pursuance of them; that all prior proposals and stipulations are merged, and that the deed is deemed to express the final and entire contract. But that where one contracts for a specified consideration to convey land at a future time, and to do at a still later period other acts for the benefit of the other contracting party, or where the contract is for a series of acts to be performed at successive periods (which, or some of which, are after the time for the execution of the conveyance) the prior contract is superseded only as to such of its provisions as are covered by the conveyance made pursuant to its terms; and that the agreement remains in full force as to all other provisions. See *Jones v. Wood*, 16 Penn. 25; *Bull v. Willard*, 9 Barb. 641; *Witbeck v. Waine*, 16 N. Y. 532, 535-6; *Howes v. Barker*, 3 John. 506; *Williams v. Hathaway*, 19 Peck 387; *Thompson v. Christian*, 28 Ala. 399; *Boyard v. Burkhalter*, 1 Denio 125; *Cox v. Henry*, 32 Penn. 18; *Selden v. Williams*, 9 Wall. 9. These cases and some others are collected in the foot notes of Sugden on Vendor

Judgment. and Purchaser, 8th Am. ed., at p. 496. This seems to me to be in accord with the view entertained by Lord Justice Bowen, as indicated by the passage above alluded to; a view that so far as I can see, must have been acted upon in *Palmer v. Johnson*, 13 Q. B. D. 351, when the Court had arrived at the conclusion that the 12th condition of sale was not confined in its scope and operation to the interval before the formal deed of conveyance was executed.

Ferguson, J.

It seems to me to be impossible to arrive fairly at the conclusion that a contract to perform certain work, or to do a certain thing for the benefit of the other contracting party at a period after the time fixed by the same agreement for the execution and final delivery of the formal conveyance becomes merged in the conveyance. There may of course be a waiver of performance, but, as I understand, waiver is a matter of intention, and has to be shewn or must appear from the acts done or left undone, and, I think what appears here instead of shewing a waiver tends to shew the contrary of it, and I am of the opinion that the part of the agreement providing for the completion or finishing of the houses (that is the five houses on Summer Hill Avenue) in the manner stipulated for (if such stipulation can in the light of the facts be fully understood) by the 30th of May did not become merged in the final conveyance, and that this provision in the original agreement remained in full force after the execution and delivery of the conveyances by the parties, and after the time stipulated for such execution and delivery.

Then as to the objections to the findings and report of the Master.

The plaintiff's claim was brought into the Master's office in different parts, and treated or dealt with by the Master in such parts.

The first part professes to be an account shewing the necessary expenditure by the plaintiff in completing these five houses so as to make them as required by the contract, and as Woodley should have had them on the 30th day of May. This account as brought in amounted to \$368.91.

It is allowed by the report at \$362.16, the Master having struck off \$6.75 in respect of the claim for plastering. The chief objection raised in the argument was that the houses were to be "similar to the houses on Ottawa street," and as before stated the houses on Ottawa street were not then finished, and that the Master took into account statements made by Woodley not at the time of the making of the contract as to the manner in which he intended to finish them (the houses on Ottawa street), which it was contended he should not have done.

Judgment.
Ferguson, J.

It was contended that there really was not for this reason anything with which the finishing of the five houses could be compared for the purpose of ascertaining whether they had been finished according to the contract, or if not, what should be allowed as the amount to be expended so as to make them as Woodley had contracted they should be.

No doubt there was this difficulty to be contended with, and there can I think be no doubt that the houses were not finished as intended by the parties when they made their contract. Counsel was unable to point out any mode of considering the matter that would produce a different result, and seemed to be obliged to be content by saying that the matter was a difficulty in the way of the plaintiff recovering. So far as I see no attempt was made by the defendant to shew by any mode of considering the matter that these houses could have been finished as the parties by the contract intended for any less sum, or that injustice to any considerable extent has been done by the finding. It may well be that the statement that the Master should not have received the evidence of the representations of Woodley is strictly correct as a matter of legal evidence, but it does not appear that the Master proceeded wholly upon these. Many of the items of this account were items that it seems not to have been disputed should have been done, and evidence of their value was given by both parties. The representations complained of had relation only to some of the items, and those not the most important ones,

Judgment. and looking at the whole matter and the result I do not
Ferguson, J. think I should be justified in setting aside the Master's conclusion. No doubt the parties had an intention when they used the words "similar to the houses on Ottawa street." Under the circumstances the words were of uncertain meaning. The contention that the plaintiff should have failed altogether as to this sum on account of the difficulty should not I think prevail, and being unable to see that injustice had been done I do not think I should disturb the Master's conclusion.

The appeal as to the part No. 1 will be dismissed with costs.

The second part of the account, or the portion of it in contention, is the allowance of \$50, as the necessary expenditure in making or constructing a drain connecting the down pipes from the eaves of the houses with a sewer on Ottawa street. The houses in question are upon Summer Hill avenue, and there is no sewer on this avenue. Both parties to the contract were aware of of this when they made their contract. They did not see fit to specify or designate the work to be done by any such document as specifications, and contented themselves by using the words, "finished similar to the houses on Ottawa street." As it appears to me, the making of this drain to the Ottawa street sewer, was not a part of the finishing of these houses, for it seems admitted on all hands, that as soon as a sewer is made on Summer Hill avenue, the drains will be to this sewer. The drain in question should, I think, be considered a temporary matter, and the plaintiff purchasing the houses with full knowledge of the facts, cannot, I think, successfully contend that such temporary drain was a part of the "finishing" of the houses. It was said that the Corporation laws required that there should be such drainage, and that it was necessary to the perfect safety of the walls of the houses; and that no tenants would rent them without some drain answering this purpose; but all this is answered by saying that such a drain is not embraced within the meaning of

the words employed, construing them in the light the parties had at the time of the contract being made, and in view of the facts known to both parties, and that whatever of a temporary character was to be done the plaintiff should do himself. Judgment.
Ferguson, J.

The appeal as to this part, number 2, will be allowed with costs.

The third part of the account is for damages for delay in completion of the houses.

The claim is not brought in as for rent lost by the plaintiff, but this seems to be the way in which the Master estimated the damages, and he allowed \$314.21. This is said to be composed of \$300 for lost rent, and \$14.41 for time and trouble.

The houses were to be finished by the 30th of May. On the 3rd of October the plaintiff took the work out of the hands of Woodley still incomplete. The sum allowed would be about \$15 per month for each house. During the period, Woodley promised from time to time to send on men and complete the work, and so kept the plaintiff under the belief that the houses would be finished by Woodley. This, I think, reasonably accounts for his not sooner taking the work out of Woodley's hands.

The question here arises as to whether or not the Master properly allowed this sort of equivalent for rent as damages for breach of the contract.

It is said that the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, such as might naturally be expected to follow its violation; and secondly, they must be certain both in their nature and in respect to the cause from which they proceed: *Griffin v. Colver*, 16 N. Y. 489, referred to in *Corbett v. Johnson*, 10 A. R. at p. 578, where *Hadley v. Baxendale*, as well as other cases and authorities are referred to as well.

Had Woodley finished the houses by the day mentioned, the plaintiff would have had the opportunity of putting in the temporary sewer, or otherwise taking proper care

Judgment. of the water from the eaves, and renting the houses. It is fair to say that he would have done this temporary work, or at all events it does not appear to me that it lies or would have lain in the mouth of Woodley to say he (the plaintiff) would not. He should have given him the opportunity by doing the work that he ought to have done.

Ferguson, J.

Both parties must be taken to have known that these houses were such as were intended to be rented, and I think it may fairly be said that the loss of rents, if it be assumed that the houses could have been rented, flowed directly and naturally, that is, in the ordinary course of things, from the breach of the contract, and this is a good reason for saying that it may fairly be supposed to have entered into the contemplation of the parties when they made the contract.

I do not think Woodley could be heard to say, I knew when I made this contract that you, the plaintiff, wanted these houses for the purpose of renting them; I agreed to have them finished, or even advanced to a certain state by a certain day. I broke my agreement. The consequence was that you were disappointed and had no opportunity to rent the houses, and yet I am not liable for damages.

I am aware that there are some technical minor objections to this way of looking at the matter. These or some of them were urged by counsel, but I think it is substantially the right view, and looking at the subject in this way, I cannot say that the Master was wrong, or that an extravagant sum has been allowed. The appeal as to this part, number 3, will be dismissed with costs.

The fourth part of the account is for damages on account of bad workmanship, &c.

In respect of this, the Master has allowed the sum of \$260. The evidence is, that of various witnesses, which is in some degree opinion evidence. Some, not complimentary remarks were made as the mode in which the Master considered parts of it. Yet after the best consideration I have been able to bestow upon the subject, I do not see my way to disturbing his finding and conclusion.

The appeal as to this part No. 4 will be dismissed with costs. Judgment.
Ferguson, J.

As to the remaining parts Nos. 5 and 6, these are not now in contention.

The result is that the cross-appeal is dismissed with costs. That the appeal as to the first part of the account is dismissed with costs. That the appeal as to the second part of the account is allowed with costs. That the appeal as to the third part of the account is dismissed with costs, and that the appeal as to the fourth part of the account is also dismissed with costs.

And that consequent upon this the balance found by the Master \$779 will be reduced by the sum of \$50, leaving the balance in plaintiffs favor \$729.

I think I may say that there should be such a set-off of costs that neither party will have costs against the other.

Order accordingly.

A. H. F. L.

[CHANCERY DIVISION.]

R. BICKERTON & Co. v. DAKIN.

BIGGINS, CLARKSON, & Co. v. DAKIN.

Lien—Mechanics' lien—Partnership—Claim of lien registered in name of, after dissolution—R. S. O. ch. 126, secs. 16, 19—"Claimant"—"Person entitled to the lien"—53 Vic. ch. 37, (O.)—Jurisdiction of High Court—Joining liens—Statement of claim under 53 Vic. ch. 37, sec. 2, (O.)—Amendment.

A claim of lien under the Mechanics' Lien Act was registered and proceedings to enforce it were taken in the name of a firm which had been dissolved and one of the members of which had died prior to the registration. The materials for which the lien was claimed were, however, all furnished by the firm before the dissolution or death, and it was provided that the dissolution was not to affect this and other engagements.

Sec. 16 of R. S. O. ch. 126, under which the lien was registered, speaks of the "claimant" of the lien, and sec. 19 of the "person entitled to the lien." The Interpretation Act, R. S. O. ch. 1, sec. 8 (13), shews what the word "person" shall include, and does not mention a "firm" or "partnership":—

Held, that the lien attached on the land, and was validly continued; the difficulty as to the word "person" was overcome by the use of the alternative word "claimant," which extended to a partnership using the firm name in the registration of the lien.

Under the "Act to simplify the Procedure for enforcing Mechanics' Liens," 53 Vic. ch. 27, it is competent to join liens so as to give jurisdiction to the High Court, though each apart may be within the competence of an inferior Court.

The plaintiffs in proceeding under 53 Vic. ch. 37 to enforce their lien filed with a Master as the "statement of claim" mentioned in sec. 2, a copy of the claim of lien and affidavit registered, verified by an affidavit, and the Master thereupon issued his certificate:—

Held, that if the "statement of claim" filed was not in proper form, inasmuch as it contained all the facts required for compliance with the Act, an amendment *nunc pro tunc* should be allowed.

Statement.

CLAIMS of lien under the "Mechanics' Lien Act," R. S. O. ch. 126, for materials furnished, were on the 2nd May, 1890, registered in the names of R. Bickerton & Co. and Biggins, Clarkson, & Co., against lands then owned by Alonzo H. Dakin. The claim of R. Bickerton & Co. was for \$178.47, and that of Biggins, Clarkson, & Co. for \$24.90. The claims were in the ordinary statutory form, and were accompanied by affidavits of T. L. Clarkson, a member of both firms, verifying them. The firm of R. Bickerton & Co. had been dissolved prior to the registra-

tion of the liens, and R. Bickerton, one of the partners, ^{Statement.} died on the 11th April, 1890, but the materials for which the lien was claimed had all been furnished before the dissolution and death. In his affidavit verifying the claim of R. Bickerton & Co., Clarkson described himself as a member of the late firm of R. Bickerton & Co., and stated that he had full knowledge of the facts set forth in the claim, and that the contract was made before the dissolution of the firm.

Proceedings to enforce these liens were taken under the "Act to simplify the Procedure for enforcing Mechanics' Liens," 53 Vic. ch. 37, (O.), before the Master at Woodstock, who issued his certificate under sec. 3 of that Act upon the 3rd July, 1890.

The following sections of 53 Vic. ch. 37 bear upon the case :

1. Any person claiming a mechanic's lien may enforce the same by means of the proceedings hereinafter set forth.

2. Without issuing a writ of summons or taking any other preliminary proceeding, the plaintiff may file a statement of claim in the office of a Master or official referee having jurisdiction in the county wherein the lands in question are situate.

3. Such statement of claim shall be verified by affidavit. Upon the filing of such statement of claim and affidavit, the Master or referee shall issue a certificate in duplicate of the filing of the same.

4. Upon the registration of such certificate in the proper registry office, or land titles' office, the action shall be deemed to have been commenced as against the owner and all other necessary parties to the action.

8. In case a notice disputing the plaintiff's lien is filed, the Master or referee shall, before taking any further proceedings, determine the question raised by the notice, or may adjourn the question before a Judge in Chambers, and, if so required by any parties, may thereupon issue a certificate of his finding.

Statement.

In these cases the only documents filed corresponding to the statement of claim mentioned in section 2 were copies of the claims of lien and affidavits registered, not entitled in any Court or cause. These were, however, verified by affidavits made by Clarkson, entitled "In the High Court of Justice, Chancery Division, between R. Bickerton & Co., plaintiffs, and Alonzo H. Dakin, defendant," (and similarly in the other case), as required by section 3.

These statements and affidavits were at the time considered sufficient by the Master, who issued his certificate, which was registered and served on E. W. Nesbitt, who appeared by a Registrar's abstract to be at that time the owner of the lands.

On the 11th July, 1890, Nesbitt filed with the Master a defence or dispute note, disputing that R. Bickerton & Co. and Biggins, Clarkson & Co. were entitled to liens, on the following grounds :

1. That the liens had not been prosecuted in due time.
2. That although a certificate of the Master had been registered and served certifying that statements of claim had been filed, the fact was that no statements of claim had been filed.
3. That 53 Vic. ch. 37,(O.), provided for commencing proceedings by a statement of claim, which had not been done.
4. That as no action had been commenced, the liens had ceased to exist.
5. That nothing was due in respect of the liens.
6. That prior to the registration of the lien in the name of R. Bickerton & Co., that firm had been dissolved, and R. Bickerton had died ; and at the time of the registration no such firm was in existence, and the proceedings should have been commenced in the individual names of the surviving partners and of the executors or administrators of R. Bickerton.

Pursuant to section 8 of 53 Vic. ch. 37, (O.), the Master Statement referred the questions raised to a Judge in Chambers, and they were argued before BOYD, C., in Chambers, on the 3rd November, 1890.

Masten, for the plaintiffs, contended that the proceedings were regular and the liens valid, but asked leave to amend in the event of the statements of claim filed by the plaintiffs being regarded as insufficient.

Aylesworth, Q. C., for the defendant Nesbitt. The lien ceases to exist unless proceedings are instituted to realize the claim under provisions of the Act. It had to be followed by proceedings in ninety days. The Act of 53 Vic. does not apply to this case at all. It applies to cases in the High Court only, and does not apply to County or Division Court cases: *Secord v. Trumm*, (*ante* p. 174.) These claims might have been enforced in the Division Court and County Court. If, however, the new Act is to be resorted to, the plaintiffs' course was to file statements of claim within ninety days. They have not filed any statement of claim sufficient to found the jurisdiction to give the certificate. The lien as to R. Bickerton & Co. was not properly registered at all, the firm having been dissolved before registration of the lien. "Person," in section 16 of R. S. O. ch. 126, does not include "firm," and a firm as such has no right to register a lien. The Interpretation Act, R. S. O. ch. 1, sec. 8, (13), shews what the word "person" shall include, and does not mention a "firm" or "partnership." The rules in the Judicature Act as to "firms" suing and being sued should not be extended: *Walker v. Rooke*, 6 Q. B. D. 631.

November 7, 1890. BOYD, C. :—

By section 16 of the Mechanics' Lien Act, R. S. O. ch. 126, a claim may be registered in the registry office where land is situate, and shall state the name and residence of the claimant * * and shall be verified by the affidavit

Judgment. of the claimant, or of his agent or assignee having full knowledge of the matter to be verified.
Boyd, C.

By section 19, where a claim is so registered, the person entitled to the lien shall be deemed a purchaser *pro tanto*, and within the provisions of the Registry Act.

The claim is by "R. Bickerton & Co., of the town of Woodstock, in the county of Oxford, contractors," and the affidavit is by T. L. Clarkson, of the same place, "a member of the late firm of R. Bickerton & Co.," and it contains a paragraph stating that he has "full knowledge of the facts set forth in the claim, and that the contract was made before the dissolution of the said firm."

The firm was dissolved by the withdrawal of the partner Bickerton, who also died on 11th April, prior to the registration of the lien, which was on 2nd May, 1890. The dissolution, however, was not to affect this and other engagements; the firm still continued for the purpose of working out this and other contracts. The materials were all furnished by this firm on or before the 5th April, so that the whole debt was incurred and the right to lien for the whole had arisen prior to the death of Bickerton. It is not to be doubted that the contract to furnish may be with a firm, and that by virtue of the furnishing materials the firm may have a lien under section 4. That speaks of "contractor," which of course includes a number of contractors in partnership as a firm. Had the lien been registered in the names of the members of the firm as in *Truax v Dixon*, 17 O. R. 366, no question could have arisen as to strict compliance with the Act. But looking at the Revised Statutes as one comprehensive law, and giving a liberal construction, as the Interpretation Act and the character of these mechanics' lien enactments require and justify, I think, contrary to my first impression, that the lien on the land has attached, and has been validly continued.

The debt for the materials could have been sued for in the name of the firm (by Con. Rule 317), and security on the land could have been rightly taken in the name of the firm, which would enure to the benefit of the individuals

composing the firm: *Maugham v. Sharpe*, 17 C. B. N. S. 443. And certainty as to the membership of the firm is given by the provisions of the Co-partnership Registration Act (R. S. O. ch. 130). By sec. 29 of the Lien Act, in cases proper for the High Court the lien may be realized according to the ordinary procedure of that Court. By that procedure the firm could have sued for debt and lien in the firm name if the proceeding to recover had been within thirty days from the furnishing, and while registration was not needed.

Judgment.
Boyd, C.

The difficulty as to the language of the Act in the use of "person" (which does not include "firm" ordinarily) is overcome by the use of "claimant," which has been held to extend to a partnership using the firm name in the registration of the lien, in the country from which our special lien law was derived: *Black's Appeal*, 2 Watts & Serg. 179. See also *Busfield v. Wheeler*, 14 Allen (Mass.) 139, where one partner had died.

It was held in England that a garnishee order would not be made attaching a debt due from a firm described by its mercantile name: *Walker v. Rooke*, 6 Q. B. D. 631. That was because the names of the partners were not stated, and there was no provision for an order upon a firm, and difficulty arose as to who should be subject to attachment for non-payment of the debt. But that does not in reason apply to proceedings prior to judgment, as here, prosecuted in the name of the firm which existed at the time of the accruing of the cause of action.

The other objections I virtually over-ruled during argument. It is competent to join liens under the recent Act so as to give jurisdiction to the High Court; though each apart might be within the competence of the County or Division Court.

So as to the statement of claim mentioned in section 2 of 53 Vic. ch. 37; that was a curable informality. The Master might have withheld his certificate till a formal paper corresponding to the "state of facts" of the old Chancery procedure had been brought before him, or, in

Judgment.

Boyd, C.

my opinion, he might have permitted the filing of such a document in proper form *nunc pro tunc*, pending the inquiry in his office. He chose to treat the claim as registered under the Mechanics' Lien Act brought before him in duplicate with accompanying affidavits as sufficient to found his certificate; and all the facts there appear which are required for literal compliance with the Act. If leave by a Judge is required to make the amendment, I grant it, and affirm otherwise the proceedings and results reported by the Master; and remit the whole to him again to be prosecuted to completion. The costs of this application to be added to the plaintiffs' lien.

G. A. B.

[An appeal from this decision is pending before the Divisional Court.]

[CHANCERY DIVISION.]

RE GRAYDON AND HAMMILL.

Sale of land—Contract of sale—Incumbrances—Local improvement rates—Apportioning taxes—Vendor and purchaser.

In a contract for sale and exchange of certain lands free from incumbrances it was provided that "unearned fire insurance premium, interest, taxes and rental" should be "proportioned and allowed to date of completion of sale" :—

Held, notwithstanding, that special frontage rates imposed for local improvements and construction of sewers by by-laws passed prior to the contract, the period for payment of which had not expired, were incumbrances to be discharged by the vendors respectively :—

Held, also, that the vendors were likewise bound to discharge a special frontage rate imposed by a by-law passed subsequently both to the date of the contract and the date fixed for the completion of the sale, inasmuch as the work was actually done and the expenditure actually made before the contract, the council having first done the work and then passed the by-law to pay for it, under 53 Vict. ch. 50, sec 38 (O). The substantial charge as a whole came into existence upon the finishing of the work.

Cumberland v. Kearns, 18 O. R. 151, 17 A. R. 281, commented on and distinguished.

THIS was a petition under the Vendor and Purchaser Statement Act, R. S. O. 1887, ch. 112, sec. 3, wherein it was set out that the petitioner, Richard Albert Graydon, entered into an agreement with Thomas J. Hammill, in the words and figures following :

I, Thomas Hammill, of Barrie, hereby covenant, promise, and agree to and with R. A. Graydon through H. Graham & Son, to purchase all and singular the detached solid brick dwelling built by him, immediately north of Mr. Hall's grounds, on the west side of Ossington Avenue, together with the grounds thereunto belonging, at the price or sum of \$3,800, payable — dollars in cash, to said H. Graham & Son, as a deposit ; also \$612 on the completion of sale and acceptance of title, and the balance as follows : will give 70 feet of land on Jamieson Avenue, lot 47, and the south 20 feet of 46, plan 588, subject to mortgage for \$562.50, with interest at six per cent or six and-a-half per cent per annum half yearly ; assume the present mortgage now thereon, upon which there is yet to be paid \$2,000 with interest thereon at six and-a-half per cent per annum half yearly. Provided that the title is good and free from encumbrance, except as aforesaid ; and title to be examined by me at my own expense, * * All clauses in this offer respecting title are to be considered as alike affecting both parties. Unearned fire insurance premium, interest,

Statement. taxes and rentals to be proportioned and allowed to date of completion of sale. Deed to be prepared at the expense of the vendor.

Dated May 21st, 1890.

T. J. HAMMILL.

Witness—J. B. GRAHAM.

I hereby accept the above offer and its terms, and covenant, promise, and agree to and with T. J. Hammill, to duly carry out the same on the terms and conditions above mentioned.

Dated May 21st, 1890.

R. A. GRAYDON.

Witness—J. B. GRAHAM.

The petition then set out by-law No. 1897, of the city of Toronto, passed August 29th, 1887, and which provided for borrowing money by the issue of debentures secured by local special rates on the property fronting or abutting on Jamieson Avenue between Dundas street and Bloor street (which included the land in the contract referred to) for the extension of Jamieson Avenue.

This by-law after reciting (amongst other things) that in the opinion of the council of the corporation it having become desirable and necessary to make the above extension as a local improvement, they had given due notice according to statute of their intention to pass a by-law for that purpose, and assess and levy the cost of such improvement upon the real property fronting on Jamieson Avenue, and that although duly notified as aforesaid of such proposed improvement, the majority of the owners of such real property, representing at least half thereof had not petitioned the council against the said work and assessment; and that the cost would be \$19,506.94; enacted that during ten years, the currency of the debentures to be issued under this by-law, the sum of \$2,535.89 should be raised annually, and that a special rate of forty-four cents six and four-tenth mills per foot was thereby imposed on the real property therein described according to the frontage thereof, over and above all the rates and taxes. It also enacted that the owners might commute the assessment by the payment of three dollars, forty-three cents, three and five-tenth mills per foot frontage of their property at anytime during the first year after the passing of the by-law, or on

any subsequent year by payment of a reduced sum therein Statement.
specified ; and that the by-law should come into operation
and take effect on August 29th, 1887.

The petition then set out by-law No. 2555 of the city of Toronto, passed on March 31st, 1890, to provide money by the issue of debentures, secured by special rates, for the construction of a sewer on Jamieson Avenue, between the first lane north of College street, and Bloor street (which included the land in question), which by-law after reciting (amongst other things), that upon the reports of the city engineer and the committee on works, it was in the opinion of the council necessary to construct the sewer in question, and that the sewer had been constructed at a cost of \$5,764.45, and that it would require a sum of \$394.08, to be raised annually to discharge this debt and interest for nineteen years, enacted that for nineteen years the currency of the debentures to be issued under this by-law, the said sum should be raised annually, and that a special rate of eight cents per foot was thereby imposed on the real property therein described according to the frontage thereof over and above all rates and taxes, and that debentures should be issued amounting to \$5044.45, on the security of the said special rate, and provided for commutation at a payment of so much per foot frontage, and that the by-law should come into operation on March 31st, 1890.

The petition went on to allege that the rates so imposed upon the lands purchased by the petitioner upon Jamieson Avenue, had not been commuted or otherwise paid or removed; that the said rates yet unpaid but charged against the land were incumbrances within the meaning of the proviso in the agreement relating to incumbrances, and that it was the duty of the respondent to commute or otherwise discharge the whole of the rates imposed by the said by-laws, and asked a declaration accordingly ; that the respondent submitted that the said rates should be treated as ordinary municipal taxes against the lands in question ; and that he was willing to pay his own proportion of the assessments, if any, which had been or might be levied

Statement. against the lands for the current year; but that he contended that he was not bound to commute or otherwise discharge any of the future rates or assessments which after the current year might, pursuant to the above by-law, be levied upon the lands: that in the event of the Court sustaining the position of the petitioner, the respondent submitted by way of cross-petition, that the corporation of Toronto had on April 15th, 1889, passed by-law 2299 to provide money by issue of debentures, secured by special rates, for the construction of a sewer on Ossington Avenue, between Harrison street and Bloor street, (which included the land in the agreement referred to) and had levied thereon an annual special rate upon the foot frontage to defray the debt created thereby in a similar manner to that in above by-law relating to the sewer on Jamieson Avenue, (said rate to be paid during a period of twenty years, the currency of the debentures to be raised under that by-law) and provided in like manner for commutation if desired; and that the said by-law should come into operation on April 15th, 1889; that the corporation of Toronto had also on July 7th, 1890, passed by-law No. 2729, being a by-law to provide for borrowing money by the issue of debentures, secured by local special rate, for the construction of a cedar block roadway and wood curbing on Ossington Avenue, between Harrison street and Bloor street (which included the land in the petition referred to), whereby it was recited (amongst other things) that it having become desirable and necessary in the opinion of the council to construct the cedar block roadway and wood curbing in question, the council thereupon gave notice of their intention to pass this by-law for that purpose, and that although duly notified, the majority of the real property owners, representing at least one half thereof, had not petitioned the council against the said work and assessment; that the work had been done at a cost of \$11,532.30; and that \$1,265.40 was required to be raised annually for a period of 10 years, the currency of the the debentures to be raised under the by-law, to pay the

debt and interest to be created by the by-law, enacted that during the said period of ten years next succeeding a special rate per foot should be imposed on the real property according to the frontage, over and above all other rates and taxes; and that debentures should be issued to raise the required sum on the security of the said special rate, and for a commutation of the special rate if desired. Statement.

The petition went on to set out that the by-laws relating to Ossington Avenue duly came into operation pursuant to their provisions, and the rates had not been commuted or otherwise paid or received; that the said rates were incumbrances within the meaning of the provisions of agreement, and that it was the duty of the petitioner to commute or otherwise discharge the whole of the said rates, so that the respondent should not during the currency of the debentures be called upon to pay any of them, and the respondent prayed a declaration accordingly; and the petitioner and respondent respectively prayed for orders the one against the other to commute and discharge the said rates on Jamieson Avenue, and Ossington Avenue, respectively, according to their contentions in the petition.

The matter was argued on October 29th, 1890, before BOYD, C.

Allan Cassels, for the vendor. The sewer rates must be commuted: *Cumberland v. Kearns*, 18 O. R. 151, 17 A. R. 281, shews that they are incumbrances. As to the cedar block roadway rates we are not bound as to them unless it be shewn that the work was done before the by-law was passed. If it was, we admit that we are bound to commute them. While *Cumberland v. Kearns*, is not directly in point, yet it decides that rates for local improvements are incumbrances within the meaning of the agreement, and the result of that decision is to entitle us to have the rates commuted.

Argument.

Marsh, Q.C., for the purchaser. The real point is as to taxes falling due in future. The sewer rates are taxes levied by the municipality; the city might have imposed a general tax; they choose to do it in this way; and the agreement provides that taxes shall be apportioned. That covers the case. The part of the agreement relating to title is not material, for matter of incumbrance is not a matter of title. As to *Cumberland v. Kearns*, it hinged on the fact that the vendor had done acts to incumber by joining in a petition to place an incumbrance on the land. I cannot contend that these taxes are not a charge, but I say they are not an incumbrance between vendor and purchaser. The first case I refer to is *Barraud v. Archer*, 2 Sim. 433, *S. C.* in App. 2 Russ. & M. 751; *Moore v. Hynes*, 22 U. C. R. 107, *esp.* at p. 115. *Bank of Montreal v. Fox*, 6 P. R. 217, shews only arrears are to be paid off. See, also, *Bliss v. Putnam*, 7 Beav. 40. The date of agreement here is May 21st, 1890, to be completed June 5th, 1890. The work in question had been done before the completion of the agreement.

Cassels, in reply. Taxes in the agreement mean only ordinary general taxes.

Marsh, general taxes are apportionable without agreement: *Peoples Loan and Deposit Co. v. Bacon*, 27 Gr. 294.

November 1st, 1890. BOYD, C.:—

Cumberland v. Kearns, 18 O. R. 151, 17 A. R. 281, does not rule this case, for two reasons: *First*, the sale there was completed, and the right to relief depended on the scope of the covenants in the conveyance; *Second*, the by-law there was passed at the instance of the vendor: whereas here the matter rests on the contract of sale, and the scheme of improvement originated apparently with the corporation as an outcome of municipal policy. The by-laws in hand recite that although duly notified of the proposed improvement, the majority of the owners had not petitioned against the work. It does not appear

whether either vendor moved against the scheme, and putting it most favourably for them it may be inferred that they were quiescent because no effectual protest could be made. Had the transactions been completed by conveyance in the statutory short form, it may be the Court could not interfere. It may well be that the qualified covenant as to incumbrances "occasioned or suffered" by the covenantor would not reach these particular municipal charges, although the contrary appears to be assumed by Field, J., in *Egg v. Blayney*, 21 Q. B. D. 107. It would not be safe, however, to act on that assumption without considering *Hobson v. Middleton*, 6 B. & C. 295, where it was held that the limited covenant extends to such permissive acts only as have through that permission an operative effect in charging the estate.

Judgment.

Boyd, C.

I have here to deal with a contract which requires that the title be "good and free from incumbrances," and although a stipulation is framed afterwards for the apportionment of taxes down to the date fixed for the completion of the sale, both parts may stand together with full effect.

It was not contended, nor could it be successfully, that these local rates were not charged upon the land, for the statute says so in terms. But it was argued that though charged they were not incumbrances within the contemplation of the parties. The parties drew their own agreement and the intention can only be reached through the words. In an ordinary contract of sale, no reference being made to incumbrances, a charge like this, created by an urban sanitary board exercising governmental powers entirely analogous to our municipalities, was declared an incumbrance which must be cleared by the vendor: *In re Bettsworth and Richer*, 37 Ch. D. 535. If a contract silent as to incumbrances so operates, can one which expressly stipulates for their removal be read otherwise? Reverting to the language of these parties: the word "taxes" is used in this connection,—“Increased fire insurance premiums, interest, taxes and rentals to be proportioned and allowed to date of completion of sale.” “Interest” I suppose

Judgment.
Boyd, C.

refers to that upon a mortgage, subject to which one lot was being sold. All these items indicate matters properly apportionable, as to which the benefit accrues *de die in diem*. Thus the word "taxes" is interpreted as referable to the usual yearly levies for the public purposes of the municipality and for which a yearly return is made to the population in the manifold protection and service rendered over the whole territorial area. This tax is of yearly imposition and cannot be anticipated or defrayed as to the coming years. But in regard to rates for local improvements, these are intended to benefit, immediately, defined property; upon the work being done, forthwith follows the advantage whereby presumably the selling value is correspondingly augmented. The liability for the whole outlay then attaches upon the properties benefited, and the claim is not one in its nature apportionable for any fraction of the year like the ordinary yearly tax for general purposes. True it is, that in case of the owner the instalment-principle is adopted, and the total is spread over so many years as answer to the probable life of the work, yet provision is made for clearing the whole by one commutation-payment for which the equivalent has already been received. When such local improvements are completed before the agreement for sale it is to be supposed that the advantage thereby bestowed upon the property has been taken into account in fixing the price. Therefore I come to the conclusion that the language used in this contract does not limit the usual right of a purchaser to get what he buys free from incumbrance. As a matter of fact the practice of conveyancers is to set forth in the abstract all charges affecting the property and something special is needed to show that the sale is made subject thereto: *In re Jackson and Oakshott*, 14 Ch. D. 851. The whole tenor of this bargain is adverse to putting such burdens on the purchaser. To exempt the vendor he should have in terms sold subject to this terminable local rate, as was done in *Re Ryan's Estate*, Ir. R. 3 Eq. 255, 258. See also *In re Sidney's Estate*, Ir. R. 1 Eq. 342.

As to the cases cited by Mr. Marsh : *Bliss v. Putnam*, 7 Beav. 40, merely shews that succession duty is not reckoned an incumbrance on property ; and *Barraud v. Archer*, 2 Sim. 433, S. C. 2 R. & M. 751 affirmed, is explained by the evidence, from which it appears that the purchaser was told that the sale was subject to certain charges which were statutory incidents of the particular kind of property. It is to be noted also that the point in *Barraud v. Archer*, was (unlike the present) as to annual payments for the drainage and preservation of fen-lands—the amount of which was published yearly by notices fixed on the Church doors. That was a variable and fluctuating future claim arising *de anno in annum*, as occasion required, and for which no present amount could be ascertained or made payable.

Judgment.
Boyd, C.

One comparatively minor question is left as to the charge for cedar block paving on Ossington Avenue under the by-law passed July 7th, 1890. The recital shews that the road had been completed at a cost of so much, to be defrayed by the ratepayers. Provision is made for a distribution of the amount over ten years, to be counted from January 7th, 1890. Now the contract of sale for this land was made on May 21st, to be completed on or before June 5th, 1890. The work being done before the contract of sale, (as proved by affidavit),* and the by-law passed after, at what point of time does the charge on the land arise ?

Now the statute (a month having elapsed after the preliminary notice) enables the council first to do the work and then to pass the by-law to pay for it (R. S. O., 1887, ch. 184, sec. 621). This section appears as sec. 619, in the Municipal Amendment Act of 1890, 53 Vict. ch. 50, sec. 38, which was in force at the date of the by-law. This is in order that the exact expense may be ascertained before the permanent obligation to pay for it is incurred by the muni-

* I refer to the affidavit of Mr. Roden, put in by consent and leave, by which it is shewn that the work was ordered to be commenced in September and was finished in December of the year 1888.

Judgment.

Boyd, C,

cipality. The right to expend moneys upon the locality, however, (*i.e.*, the potential charge) arose when the month elapsed without the intervention of the majority of frontagers. The substantial charge as a whole came into existence upon the finishing of the work. That is in accord with the holding of North, J., in the case cited *In re Bettesworth and Richer*, 37 Ch. D. 535. This decision though not cordially received by Kay, J., in *Re Boor, Boor v. Hopkins*, 40 Ch. D. 372, was followed by the Divisional Court in *Hornsey Local Board v. Monarch Investment Building Society*, 23 Q. B. D. 149, and this was affirmed in appeal: *S. C.*, 24 Q. B. D. 1. After the completion of the work all that remained to be done was to apportion the rate, and for this all the *data* then existed; expense, frontage and time. To such a state of facts the maxim *id certum est, &c.*, applies. Hence I regard the expenditure actually made before the contract of sale as a liability affecting the land, even before it passed into a formally effective shape by the enactment of a by-law.

In *Bettesworth and Richer*, 37 Ch. D. 535, the whole cost of improvement was, as apportioned, payable at one period, but that is not a material distinction where the question arises in specific performance between vendor and purchaser. The payment by instalments over a given period is in nature and effect like a rent-charge, and this on the usual contract of sale must be defrayed out of the price, or otherwise satisfied by the vendor: *In re Great Northern R. W. Co. and Sanderson*, 25 Ch. D. 788.

My conclusion is, then, that these various frontage rates are incumbrances which the vendors respectively must remove.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

REGINA V. DAY.

Criminal law—Statements of prisoner to detectives—Admissibility of evidence.

During the trial of the prisoner for murder questions arose as to the admissibility in evidence of statements made by him to certain detectives, in answer to questions put to him by them, he being at the time in their custody :—

Held, upon a case reserved, that the statements were admissible in evidence.

ARTHUR HOYT DAY was tried before ROSE, J., and a jury ^{Statement.} at the Welland Assizes on October 7th, 1890, for the murder of his wife, Desiré Day,

During the trial questions arose as to the admissibility in evidence of statements made by the prisoner to certain detectives, in answer to questions put to him by the detectives, the prisoner being at the time in their custody.

ROSE, J., admitted the evidence, but, in view of the decision in *Regina v. Gavin*, 15 Cox 656, reserved a case for the consideration of the Justices of the Queen's Bench Division of the High Court of Justice.

The prisoner was convicted.

The question reserved was whether the evidence was properly admitted.

The case was argued before ARMOUR, C. J., FALCONBRIDGE and STREET, JJ., on November 26, 1890.

German, for the prisoner. I contend that statements elicited from an accused person by cross-examination are not admissible in evidence. After the arrest of the prisoner he was in Court and in the same position as if he were in the dock, and he could not be cross-examined. Statements made by prisoners have been frequently admitted in evidence, but I submit only where they have been voluntary statements. Now a system or practice of cross-examining prisoners has grown up among detectives, and

Statement. there are strong reasons for not admitting evidence so obtained.

[ARMOUR, C. J.—I think the practice of cross-examining prisoners reprehensible, and the superiors of the detectives should instruct them not to do so ; but the question here is a legal one, whether the evidence is admissible.]

I refer to *Regina v. Mick*, 3 F. & F. 822 ; *Regina v. Priest*, 2 Cox 378 ; *Regina v. Bodkin*, 9 Cox 403. *Regina v. Gavin*, 15 Cox 656, is the case upon which this question was reserved. It is, I admit, a *nisi prius* decision of a single Judge, but it is directly in point, and is the latest case, having been decided in 1885. There are grave objections to this kind of evidence. What is given to the Court is not in fact the statement of the accused ; if the questions and the answers were given to the Court exactly as they were made, the substance and meaning would be very different. It is contrary to all principle that the accused should be cross-examined.

[ARMOUR, C. J., referred to *Regina v. Johnston*, 15 Ir. C. L. 60, (1864), where all the cases in England and Ireland are reviewed.]

J. R. Cartwright, Q.C., for the Crown. All the cases up to 1842, are collected in Joy on Confessions, and the cases since in *Regina v. Johnston*, 15 Ir. C. L. 60. In Russell on Crimes, 5th ed., vol. 3, p. 473, it is said that *Regina v. Bodkin*, 9 Cox 403, seems to deserve reconsideration. In *Regina v. Gavin*, 15 Cox 656, it was proposed to put in a statement made by one prisoner as evidence against others, who had admitted its accuracy. Under the circumstances of that case, it would seem that the evidence was properly rejected. But at any rate that case is not binding on this Court. It is to be observed that the evidence in the present case shews that the detectives gave the prisoner the usual caution.

[ARMOUR, C.J.—It was a very illusory caution. They first cautioned the man against saying anything, and then proceeded to question him].

I refer to the following cases:—*Warickshall's Case*, 1 Argument. Leach 263 (1783); *Rex v. Gibney*, Jebb's Crown and Presentment Cases 15 (1822); *Rex v. Thornton*, 1 Moody C. C. 27 (1824); *Rex v. Long*, 6 C. & P. 179 (1833); *Kerr's Case*, 8 C. & P. 179 (1837); *Regina v. Hughes*, 1 Crawford & Dix C. C. 13 (1839); *Regina v. Doyle*, *ib.* 396 (1840); *Regina v. Devlin*, 2 Crawford & Dix C. C. 151 (1841); *Regina v. Baldry*, 2 Denison 430 (1852); *Regina v. Sleeman*, 1 Dears. 249 (1853); *Regina v. Berriman*, 6 Cox 388 (1854); *Regina v. Toole*, 7 Cox 244 (1856); *Regina v. Hassett*, 8 Cox 511 (1861); *Regina v. Cheverton*, 2 F. & F. 833 (1862); *Regina v. Finkle*, 15 C. P. 453 (1865); *Regina v. Jarvis*, 10 Cox 574 (1867); *Regina v. Reeve*, 12 Cox 179 (1872); *Regina v. Reason*, *ib.* 228 (1872); *Regina v. Vernon*, *ib.* 153 (1872). I rely especially on *Regina v. Johnston*, 15 Ir. C.L. 60, which is a decision of eight Judges, with three dissenting Judges.

At the close of the argument the judgment of the Court was delivered by

ARMOUR, C. J.:—

We need not reserve the case for further consideration. We have looked at all the authorities, including those cited by Mr. German. We think, although we reprehend the practice of questioning prisoners, that we cannot come to the conclusion that evidence obtained by such questioning is inadmissible. The great weight of authority in England and Ireland, and all the cases in which the point has been considered by a Court for Crown cases reserved, go to shew that the evidence is admissible. We must leave it to the Legislature to determine whether the practice of cross-examining prisoners is legally to obtain hereafter. We hold the evidence admissible, and affirm the conviction.

[QUEEN'S BENCH DIVISION.]

REGINA v. RAY.

Criminal law—Bigamy—Proof of first marriage.

Upon an indictment for bigamy the first marriage must be strictly proved as a marriage *de jure*.

Evidence of a confession by the prisoner of his first marriage is not evidence upon which he can be convicted.

Statement.

HENRY RAY was tried before ROSE, J., and a jury, at the Hamilton Assizes, on September 3rd, 1890, for bigamy.

No one was called to prove the first marriage who was present on the occasion; nor was documentary evidence adduced; but circumstantial evidence and the admissions of the prisoner were received and submitted to the jury, and the evidence of the second wife was then received. The prisoner was convicted.

ROSE, J., reserved the following questions for the consideration of the Justices of the Queen's Bench Division of the High Court of Justice:

1. Whether the evidence offered and received to prove the first marriage was competent evidence.
2. Whether the evidence of the second wife was properly received.

The case was argued before ARMOUR, C. J., FALCONBRIDGE and STREET, JJ., on November 26th, 1890.

J. R. Cartwright, Q. C., for the Crown. The question is, whether evidence of the confession of the prisoner as to his first marriage is admissible, and whether that, taken in connection with other circumstances proved, is sufficient to sustain the conviction. [ARMOUR, C. J.—You have to prove a marriage *de jure*.] *Regina v. Simmonsto*, 1 C. & K. 164, and *Regina v. Newton*, 2 Moo. & Rob. 503 shew that on an indictment for bigamy the first marriage may be proved by the admissions of the prisoner. In *Regina v. Flaherty*, 2 C. & K. 782, it was held that

there ought to be some proof of the first marriage ^{Argument} beyond the mere statement of the prisoner, though that was some evidence. These are all *nisi prius* decisions. *Regina v. Savage*, 13 Cox 178, was the case upon which Rose, J., reserved this. That is a decision of Lush, J., at *nisi prius*, and is not binding on this Court. *Regina v. Duff*, 29 C. P. 255, a decision of the full Court upon a reserved case, is an authority for this evidence being received rather than against it. The prisoner himself is a good witness to shew the marriage. He was there. The following authorities shew that the evidence is admissible: Wharton's Criminal Law, 9th ed., note to sec. 1700; *Miles v. United States*, 103 U. S. 304; Russell on Crimes, 5th ed., vol. 3, pp. 314, 315; *Regina v. Creamer*, 10 Lower Can. 404; *Regina v. McQuiggan*, 2 Lower Can. 340; Bishop on Statutory Crimes, 2nd ed., sec. 610.

Lyman Lee, for the prisoner, was not called upon.

The judgment of the Court was delivered by

ARMOUR, C. J.:—

We must follow the latest English case, *Regina v. Savage*, 13 Cox 178, decided in 1876, and hold that evidence of a confession of his first marriage made by the prisoner is not evidence upon which he could be convicted. It is not a good thing to allow looseness of proof. A marriage in law must be strictly proved. The conviction will be quashed.

[CHANCERY DIVISION.]

IN THE MATTER OF THE WINDING UP OF THE CENTRAL
BANK OF CANADA.

BAXTER V. CENTRAL BANK OF CANADA.

Injunction—Restraining proceedings in Montreal Court—Winding up proceedings—R. S. C. c. 129.

Injunctions granted to restrain proceedings in a Montreal Court against a bank in process of being wound up in Ontario under the Dominion Winding-up Act, and also such proceedings against the liquidators appointed in the winding up for things done by them in their official capacity, and from attacking the validity of their appointment.

Statement.

THIS was an application for injunctions under the following circumstances. On December 16th, 1887, an order was made in the High Court of Justice for Ontario for the winding up of the Central Bank of Canada, having its head office in the City of Toronto, under the Dominion Winding up Act, R.S.C. ch. 129, which winding up proceedings were at the time of this application still in progress.

On June 30th, 1890, James Baxter, a broker doing business in Montreal, petitioned for and obtained the leave of the Superior Court in the District of Montreal for the issue of a writ of summons out of that Court, and did accordingly issue a writ of summons calling upon the Central Bank of Canada, William H. Howland, and Henry Lye, of whom the last two were liquidators of the said Bank, appointed in the winding up proceedings, to appear and answer the demands of Baxter contained in the declaration thereto annexed, which charges were that the said Howland and Lye since about thirty months past "as well personally as in their quality of liquidators of the Central Bank of Canada, maliciously and without any reason, but that of injuring the plaintiff in his reputation, credit, honour and business, have directly and indirectly, verbally and through the press and otherwise spread through the Provinces of Ontario and Quebec, and especially in the City and District of Montreal, where the

plaintiff does his business, the rumor that the plaintiff was indebted to the Central Bank of Canada, the defendant, in a sum exceeding \$115,000, for moneys pretended to be advanced by the said Central Bank of Canada to the said plaintiff, and which the plaintiff refused to pay back," and other similar charges. And the declaration claimed that the plaintiff had a right to recover the sum of \$100,000, from the defendants, jointly and severally, and from the defendants Howland and Lye, as well personally as in their quality of liquidators of the said Central Bank of Canada, and prayed that the defendants be jointly and severally condemned to pay the plaintiff \$100,000, and that Howland and Lye be further held for payment of the said sum of \$100,000, by all legal means whatever. Statement.

On September 11th, 1890, Baxter issued another writ of summons out of the same Court at Montreal, calling on William Howland and Henry Lye to answer his demands as in the declaration thereto annexed contained, which charged that the said Howland and Lye had assumed to act as liquidators of the Central Bank without being legally and properly authorized so to do, that presuming to act as such liquidators, they on December 29th, 1888, through their solicitors made written demand on the plaintiff for payment of an alleged indebtedness by him to the Central Bank; that the plaintiff replied asking particulars of the claim, which the defendants did not reply to; that the defendants were actuated by malice against the plaintiff in so doing; that on June 23rd, 1889, the defendants without any right or authority so to do, commenced an action in the High Court of Justice for Ontario claiming from the plaintiff \$115,000, they at the time well knowing that the claim was wholly unfounded; that the plaintiff's credit and business was injured by this; that these proceedings were taken by the defendants with malice and for the purpose of injuring the plaintiff; that the defendants had ever since the said Bank was placed in liquidation attempted under all circumstances to disseminate rumours injurious to the plaintiff as a business man;

Statement. that in further pursuance of their intentions to injure him, the defendants caused a judgment by default to be entered against the plaintiff for \$159,000, and had advertised the same generally through Canada : that by their said wrongful acts the defendants had caused the plaintiff damage to the extent of \$200,000, which he therefore claimed against them jointly and severally.

On September 16th, 1890, these motions were made *ex parte*, before BOYD, C., for an injunction restraining the further prosecution of the above actions.

W. R. Meredith, Q.C., for the motions.

The Provincial Court cannot interfere with a Federal Officer : *In re Neagle*, 39 Fed. R. 833, 848, S.C., in App. 30 Cent. L. J. 365 ; *Martin v. Hunter*, 1 Wheat. at p. 362-3.

[BOYD, C. But if a liquidator has acted wrongfully he has to stand on his own footing. This is the principle in England. The analogy of the American cases is very remote.]

In the case of receivers it seems to be otherwise ; *Aston v. Heron*, 2 Myl. & K. 390 ; *Chalie v. Pickering*, 1 Keen 749 ; *Re Neagle*, shews that the Federal Court had power to enquire into the alleged wrongful conduct of its officer, and to acquit him. Substantially these actions are an attack upon the orders of the Court.

[BOYD, C. So far as the liquidators were acting under the order of the Court I think there would be jurisdiction to interfere. But the plaintiff alleges that quite apart from their official position, the liquidators have acted wrongfully.]

That was so in the *Neagle case*. Then I refer also to the observations of the Master of the Rolls, in *Re International Pulp and Paper Co.*, 3 Ch. D. 594 ; *Fisher v. Glass*, 9 Gr. 46.

Per BOYD, C. Let the order go in the first action restraining James Baxter, his attorneys, solicitors and agents from further prosecuting that action as against the

said Central Bank, and William Howland and Henry Lye as liquidators thereof, and so far also as the said action relates to or may affect the said Bank, Howland and Lye as liquidators thereof, and from further prosecuting the said action against Howland and Lye, or either of them for or in respect of any act done by them as officers of this Court or under the authority thereof, or in discharge of their duties as such liquidators and for or in respect of any claim in respect of which relief is in the said action sought against or out of the assets of the said Central Bank of Canada, and from commencing any other proceeding against the Bank, or Howland or Lye as liquidators or in respect to like matters. And in the second action let a like order go restraining James Baxter, his attorneys, solicitors and agents from further prosecuting the same and from bringing any other action against Howland or Lye so far as the said pending or any other action is or shall be brought against them as liquidators of the said Bank or in respect of any act or acts done by them as officers of this Court or under the direction or authority of any order of this Court made herein and from in any such action calling in question or attacking the validity of the appointment of the said Howland and Lye or either of them as liquidators of the said Bank or calling in question or attacking the validity of the order giving leave to bring the action against James Baxter, or any act done under the authority thereof, or by the said Howland and Lye or either of them, in pursuance of any such order or in discharge of their duties as liquidators of the said Bank.

Judgment.

Boyd, C.

Orders accordingly.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

CARR ET AL. v. CORFIELD ET AL.

Voluntary conveyance—Action to set aside—Fraudulent intent—Defeating creditors.

Fraudulent intention is a material element in an action to set aside a conveyance as being voluntary and fraudulent against creditors, and where it does not exist the action cannot succeed.

The fact that the result of a conveyance is to defeat creditors is not necessarily proof that the intention of the grantor in making it was fraudulent.

And where a debtor, under the mistaken belief that she was a trustee of a sum of money invested by her in land, in her own name, made a conveyance thereof to the supposed *cestuis que trustent*, honestly thinking she was carrying the trust into effect, an action to set aside the conveyance was dismissed.

Statement.

THE plaintiff was an execution creditor of the defendant Elizabeth W. Corfield, and brought this action to set aside, as fraudulent against creditors, a conveyance made by her to the infant defendants, Ebenezer Wallis and Sidney E. Wallis, who were her grandchildren.

The defendant Elizabeth W. Corfield was the widow of one Couch, who died in March, 1886, in London, England, where she lived with him at the time. While on his death-bed, and about a fortnight before his death, he directed her to take certain moneys of his, after his death, and invest it for the benefit of the infant defendants. He made a will about the same time, which was lost and which was not proved at the trial. After her husband's death Mrs. Corfield came out to Ontario with her daughter, Mrs. Wallis, and the two infant defendants. Part of the money left by the deceased was spent in travelling expenses and the remainder, some \$300, was deposited in a bank in Picton, in Mrs. Corfield's own name, where it remained until \$260 of it was expended in the purchase of the land in question. Having negotiated for its purchase, she went to a solicitor in Picton, and having told him that the money was not hers but belonged to the infant defendants, she instructed him to draw the conveyance to them.

In the course of her conversation with the solicitor she ^{Statement.} mentioned that her second husband, whom she had lately married, had an idea of going to the United States, and that, if he did, she intended to sell the property in question and buy other land for the infants in the place where they settled. The solicitor then pointed out the difficulty of disposing of the land in question should the title be taken in the names of the infants, and suggested her taking it in her own name, and this suggestion was adopted.

The conveyance was made to her on 20th March, 1889. On the 14th March, 1889, she had indorsed for her son-in-law a note for \$22.50, which he had made for the price of a horse; excepting this liability she was at the time free from debt. On the 26th March, 1889, she indorsed another note for her son-in-law for \$45, due in five months.

The last mentioned note came into the possession of the plaintiffs, who were store-keepers, as part payment for some groceries, before its maturity, and it was reduced by a payment of \$20 made by the maker shortly afterwards, so that less than \$30 remained unpaid upon it, including interest. The plaintiffs asked Mrs. Corfield for a mortgage, which she refused to give, telling the plaintiffs that the land was not hers but her grandchildren's. Then they endeavoured to persuade her to borrow from them enough money to increase their debt to \$40, or to supply her with groceries for the same purpose. The object they had in view was not disclosed to her, but she refused the offers made. Then the plaintiffs heard of the existence of the note for \$22.50 which she had indorsed on 14th March, 1889, and purchased it. They then brought an action against her in the Division Court upon both notes and recovered judgment for \$56.14, including costs, on 6th August, 1890. This judgment was removed by transcript into the County Court on 23rd August, 1890, and executions placed in the sheriff's hands.

On the 28th June, 1890, after being served with the summons in the Division Court action, Mrs. Corfield executed a conveyance to the infant defendants of the property in

Statement.

question, the consideration stated in the conveyance being her natural love and affection for them and the sum of \$200. On 26th August, 1890, this action was commenced; its object being to set aside the conveyance to the children as being voluntary and fraudulent against the plaintiffs, and to have the land sold to realize the plaintiffs' debt.

The action was tried before STREET, J., without a jury, at Picton, on the 8th October, 1890.

Clute, Q.C., for the plaintiffs.

Alcorn, for the defendant Elizabeth W. Corfield.

Watson, Q.C., for the infant defendants.

The following authorities were referred to :—*Knox v. Traver*, 24 Gr. 477 ; *Merritt v. Niles*, 28 Gr. 346 ; *Payne v. Marshall*, 18 O. R. 488 ; *Spirett v. Willows*, 3 DeG. J. & S. 293 ; *Freeman v. Pope*, L. R. 5 Ch. 538 ; *Burns v. McKay*, 10 O. R. 167 ; *Johnson v. Hope*, 17 A. R. 10.

October 17, 1890. STREET, J. :—

It was established to my satisfaction by the evidence of the solicitor that Mrs. Corfield stated to him, when giving him instructions for the conveyance to her grandchildren in March, 1889, that the purchase money belonged to them, and that the conveyance was taken to her and not to the children at his suggestion and for the reason stated. At this time there was no motive for her making any misstatement of fact, for she owed nothing and had no liabilities but the note for \$22.50 lately indorsed for her son-in-law, which she can hardly at that time have expected she would have to pay.

I think it may, therefore, be accepted as a fact that at that time she undoubtedly believed herself to be dealing with her grandchildren's money. The evidence failed to establish that as a matter of law a valid trust of the money in favour of the children was created by what took place in the lifetime of Mr. Couch, but it is established that Mrs. Corfield believed herself to be in the position of

a trustee with regard to it. I think that this circumstance is sufficient to negative an intent on her part to defraud her creditors in making the conveyance to the infants, and that her intent in doing so must be taken to have been to carry into effect what she had purposed doing when she originally bought the land, namely, to place in their names the title to land which had been bought for them with their own money. See *Ex p. Kelly*, 11 Ch. D. 306; *Ex p. Stubbins*, 17 Ch. D. 58; *Ex p. Mercer*, 17 Q. B. D. 290.

Judgment.

Street, J.

The fraudulent intention is a material element in cases of this nature, and where it does not exist the action cannot succeed. The fact that the result of a conveyance is to defeat creditors is not necessarily proof that the intention of the grantor in making it was fraudulent: *Freeman v. Pope*, L. R. 5 Ch. 538; *Ex p. Mercer*, 17 Q. B. D. 290; *Ex p. Taylor*, 18 Q. B. D. 295; and here another and a sufficient motive and reason for the conveyance has been shewn.

The action must be dismissed with costs.

[CHANCERY DIVISION.]

THE ATTORNEY-GENERAL OF CANADA V. THE ATTORNEY-GENERAL OF ONTARIO.

Constitutional law—"British North America Act"—"*Act respecting the executive administration of the laws of this province*"—51 Vict. ch. 5, (O.)
 —*Presumption in favour of validity of Act*—*Objection to form of statute*
 —*Office of Lieutenant-Governor*—*Criminal law*—*Provincial penal legislation*—*Royal prerogative*—*Parliamentary government*—*B. N. A. Act, secs. 65, 92.*

Held, that the Ontario Statute, 51 Vict. ch. 5, entitled "*An Act respecting the executive administration of the Laws of this Province*," whereby the pardoning power in certain cases, and other executive functions, are vested in the Lieutenant-Governor, is *intra vires* of the Provincial Legislature.

An enactment couched in general language, is not to be held invalid by reason of any ambiguity, as to what is covered, arising therefrom. Language, large or loose, is to be shaped by presuming an intention to act with candour and within the bounds of constitutional competence.

The intention of sec. 92, sub-sec. 1, of the B. N. A. Act, is to keep intact the headship of the Provincial government, forming as it does, the link of federal power; no essential change is possible in the constitutional position or functions of this chief officer, but that does not inhibit a statutory increase of duties germane to the office.

Though there may exist no direct or immediately representative co-ordination of Queen and people in the Provincial Assembly, yet sovereign power is a unity, and though distributed in different channels and under different names it must be politically and organically identical throughout the Empire.

The Act in question may be classified as one made in relation to the imposition of punishment; or from another point of approach, it may be covered by the provisions for the "administration of justice in the province":—

Held, also, that section 2 of the Act in question properly construed, refers to offences under existing laws enacted by the province, or to laws operating therein passed by the old Province of Canada or Great Britain, in regard to matters which fall within those assigned to provincial legislation by the B. N. A. Act.

Statement.

THIS was a case presented under the provisions of the Judicature Act, R. S. O. 1887, ch. 44, sec. 52, sub-sec. 2, and the question submitted for decision, was the validity of the Ontario Statute, 51 Vict. ch. 5, entitled "*An Act respecting the Executive Administration of the Laws of this Province*;" which Act, after reciting section 65 of the British North America Act, 1867, and that by section 92 of the said Act, it was provided that in each Province of the Dominion of Canada, the Legislature might exclusively make laws in relation to matters coming within the classes

of subjects thereafter mentioned, proceeded to enact as *Statement* follows :

1. In matters within the jurisdiction of the Legislature of the Province, all powers, authorities, and functions which, in respect of like matters, were vested in or exercisable by the Governor or Lieutenant-Governors of the several Provinces, now forming part of the Dominion of Canada, or any of the said Provinces, under commissions, instructions, or otherwise, at or before the passing of the said Act are, and shall be (so far as this Legislature has power thus to enact) vested in and exercisable by the Lieutenant-Governor or Administrator for the time being of this Province, in the name of Her Majesty or otherwise, as the case may require ; subject always to the Royal Prerogative as heretofore.

2. The preceding section shall be deemed to include the power of commuting and remitting sentences for offences against the laws of this Province, or offences over which the legislative authority of the Province extends.

3. Nothing in this Act contained, shall be construed to imply that the Lieutenant-Governor or Administrator has not had heretofore the powers, authorities, and functions in the preceding two sections mentioned.

In his statement of claim, the Attorney-General of Canada alleged the Act in question to be invalid, and *ultra vires*, upon the following grounds :

1. The said statute purports to confer upon the Lieutenant-Governor, or the Administrator for the time being of the said Province, powers, authorities, and functions beyond those conferred upon the said Lieutenant-Governor or Administrator by the British North America Act, and beyond those which it is within the power of the said Legislative Assembly to confer.

2. It purports also to include in such powers so conferred, the right of commuting and remitting sentences for offences against the laws of the Province, or offences over which the legislative authority of the Province extends, and is in this respect beyond the power and authority of the said Legislative Assembly.

3. The said statute is in contravention of the limitation imposed upon the said Legislature by the exception contained in section 92 of the British North America Act, as regards the office of Lieutenant-Governor.

4. The said statute purports either to declare the meaning of or to amend the British North America Act in the matters thereby dealt with, and is, in either case, beyond the competence of the said Legislature.

The Attorney-General of Ontario demurred on the ground that the Act was *intra vires*, and that the above grounds of objection to the Act were unfounded.

The case was argued upon June 18th and 19th, 1890, before BOYD, C., and FERGUSON, and ROBERTSON, JJ.

Argument.

C. Robinson, Q.C., for the Attorney-General of Canada. The power of commuting and remitting sentences conferred by this Act upon the Lieutenant-Governor involves the prerogative of pardon, which we contend belongs to the Governor-General, as directly representing the Queen, not merely in regard to crimes properly so-called, but in regard to all sentences pronounced upon offences against provincial laws by a Court of competent jurisdiction. It has been practically settled since 1869 that as to crimes properly so called this prerogative belongs to the Governor-General: See Can. Sess. Papers, 1869, No. 16. The prerogative of mercy is one of the highest prerogatives, and is described as personal to and inseparable from the Crown: Bacon's Abridg., vol. 6, *sub voce* "Pardon"; *Commonwealth v. Halloway*, 2 Am. Law Reg., N. S. 474; Criminal Law Magazine, vol. 6, p. 457; Chitty on Prerogative, pp. 88, 92, 102. It extends to offences of every description, *e.g.*, even to a fine imposed by the College of Physicians upon a medical man for malpractice: *Greenvelt's Case*, 1 Ld. Raymond 214; 2 Hawk P. C. c. 37, sec. 41. Now there is no limit to the power of punishment by fine, penalty, or imprisonment conferred upon Provincial Legislatures by section 92 of the B. N. A. Act. The imprisonment may be for life, and the fine may amount to a total deprivation of property. It is impossible to draw any clear and substantial distinction between punishments of this character and the offences for which they may be imposed, and crimes properly so called; and therefore there can be no reason, founded upon the respective gravity of the offences or severity of the punishment, for any distinction as to the power of pardon. This power being of a high prerogative character can be effectively diverted from the direct representative of the Crown only by a clear, express enactment or by irresistible inference: *Lenoir v. Ritchie*, 3 S. C. R. 621, 622; Maxwell on Statutes, 2nd ed., p. 161; Endlich on Statutes, p. 323, section 161. The imposition of punishment for the purpose of enforcing a law certainly does not necessarily carry with it the power of remission.

Moreover, this statute purports to confer the power of **Argument.** pardon on the Lieutenant-Governor as to offences over which the legislative authority of the Province extends. The plain meaning of the 2nd section is to confer a power of pardon for any offence which the Provincial Legislature might have created, although they have not done so, and which, therefore, at the time, is an offence only by virtue of some Dominion enactment. There are many things which are, or might be, offences under Provincial statutes, while at the same time they are punishable as crimes by the laws of the Dominion.

It may be argued, however, that the Provincial Legislature might undoubtedly make their punishment imprisonment at the discretion of the Lieutenant-Governor, or a fine to be lessened or varied by him or any other named officer. But this does not touch the point, for there the remission would be by virtue of the sentence itself, and not by the exercise of any prerogative power. Again, the effect of a pardon is to wholly wipe out the offence as if it had not been committed, and it may be asked what would be the effect of a pardon by the Lieutenant-Governor of an offence against Provincial legislation as regards the liability to be afterwards indicted for the same offence under a Dominion statute. This shews the inconvenience of the division of the pardoning power for which the Province contends; whereas section 14 of the B. N. A. Act supplies the means of remedying any inconvenience in the power continuing to rest with the Dominion.

Again, it would be unmeaning and inconsistent to say that section 2 must be read into section 1, and that the power of pardon is given subject to the royal prerogative. There can be no division of that prerogative. The power to pardon implies the power to refuse to pardon, and to give a right to the Lieutenant-Governor which can be exercised only by the Governor-General. "subject to the exercise of it by the latter," is a contradiction which cannot have been intended.

Then as to the general grant of executive powers in

Argument.

section 1 of the Act in question : we do not admit that the Provincial Legislature can confer any such powers. We contend that the purport and object of section 65 of the B. N. A. Act was not to vest powers, but to define the manner of their exercise, and to say in effect that powers which before the union were to be exercised in a specified manner should be exercised in the same way afterwards. But even if this section 65 is to be regarded as a substantive grant of powers, the power to alter must be qualified by reference to the legislative powers conferred under section 92 of the B. N. A. Act. No general power to grant executive authority is given to the Provincial Legislatures, and admitting, for the sake of argument, that they may grant such executive powers as are essential and necessary to the proper exercise of their legislative powers under section 92, such powers can be granted only in connection with such legislation ; and that they are so legislating within section 92, must appear upon the face of their statute ; and they have no power to grant detached executive powers indefinite and unconnected with and so far as appears unnecessary for any part of their actual legislation. Moreover the grant of powers in the B. N. A. Act, sec. 65, if it be such a grant at all, is of statutory powers only ; but this Ontario Act purports to confer all such powers as before the union were vested in the Lieutenant-Governor, not under statute only, but under commission, instructions, or otherwise. There is thus an important addition to the executive powers of the Lieutenant-Governor which is neither definite or possible of ascertainment, except by a reference, which is itself impossible, to all the executive powers conferred by instructions, conditions, or it may be even in some less formal manner. There may well be among these powers some which, though connected with subjects entrusted to the Provincial Legislature, it would be impossible for the Lieutenant-Governor to exercise by reason of their encroachment upon the Dominion powers.

It seems manifest, therefore, that the effect of this Ontario statute is either to declare the meaning of the B. N.

A. Act as conferring such powers as are referred to in it, **Argument** which cannot be done by a Provincial Legislature in the form of a declaratory enactment, or else to add to the powers of the Lieutenant-Governor beyond those given in the B. N. A. Act, which it is clear they had no authority to do.

A. H. F. Lefroy, on the same side. It is necessary to remember the broad distinction existing in respect to executive powers and functions, which is clearly pointed out in Dicey's *Law of the Constitution*, 3rd ed., p. 348, between such as are created by statute, or exist under a modified form by virtue of statutes, and such as arise out of or form part of the inherent prerogatives of the Sovereign, or of some delegated portion of these prerogatives, such prerogative powers being anterior to any statute. It is quite clear that the executive powers and functions vested in the Governors and Lieutenant-Governors of Provinces at the time of Confederation were, as in the case of the Sovereign herself, in part, of a statutory nature, and for the rest prerogative powers delegated to them under their commissions. Now, as to such statutory executive powers, in the case of what was, at the time of Confederation, the Province of Canada, they appear, so far as they were applicable, to have been vested in the then newly created Lieutenant-Governors of Ontario and Quebec by section 65 of the B. N. A. Act. But even though we concede, for the purposes of argument, that section 65 gives jurisdiction to the Provincial Legislatures to alter, abolish, or add to such statutory powers, nay, even though we concede that executive power under the Provincial constitutions is co-extensive with legislative power, it does not appear material, because this Ontario Act is not concerned with mere statutory executive powers, but extends to powers existing in the ante-confederation governors under their commissions, which powers were delegated portions of the Royal prerogative.

Thus this Act assumes to directly deal with and affect Royal prerogative powers, although none of the enumerated powers of Provincial Legislatures under the B. N. A.

Argument. Act either by express words or necessary implication confers any such power of dealing with Royal prerogatives, and several Judges of the Supreme Court distinctly so held in *Lenoir v. Ritchie*, 3 S. C. R. at pp. 628, 632, 635 ; S. C., 1 Cart. at pp. 535, 537-9, and 542.

However, let it be conceded for the moment that in legislating under their specified powers, the Provincial Legislatures may affect the Royal prerogative, that does not justify this Ontario Act. Section 65 of the British North America Act can only mean that Provincial Legislatures can abolish and alter the existing statutory powers by statutes falling within their powers of legislation under other sections of the Act. Now the judicial committee of the Privy Council have repeatedly held that Provincial legislatures have only power of legislation in respect to the enumerated and specified and specific matters mentioned in the British North America Act. For any Provincial Act to be valid, it must be possible to predicate of it that it is an Act in relation to one of these enumerated classes of subjects ; as for example, to say, this is an Act relating to municipal institutions, or this is an Act relating to some specific local or private matter in the Province. Here, however, the Ontario Legislature has assumed to take a number of detached executive powers and functions, and vest them in the Lieutenant-Governor, quite apart from any statute passed in relation to any of the classes of subjects committed to their jurisdiction. Such an Act could only be classified as an Act in relation to the general executive functions of the Lieutenant-Governor, but nothing in the British North America Act warrants such a Provincial Act. The importance of the point taken is apparent, when we consider that, provided a local legislature is enacting an Act within the specified classes of subjects assigned to such legislatures, and giving only executive powers necessary to carry out such an Act, it is possible to see exactly what they are doing ; whereas it is quite impossible to see what they are really doing by a vague general enactment such as the one in question.

Lastly, the Act in question vests the executive powers **Argument.** with which it deals in the Lieutenant-Governor *virtute officii*. They are to be attached to his office, not as the functionary named in any statute for the purpose of carrying out the provisions of that statute, but simply as the person holding the office of Lieutenant-Governor. This is legislating in regard to the office of Lieutenant-Governor, which is expressly prohibited by section 92, sub-sec. 1 of the B. N. A. Act.

Edward Blake, Q.C., for the Attorney-General of Ontario. The Court has no right to criticise the form of the Act, whether inconvenient or not : *Severn v. The Queen*, 2 S. C. R. 414, S. C., 1 Cart. 414; *Regina v. Wason*, 17 A. R. 221-225. By express statement nothing is attempted beyond the power of the Legislature. "Subject to the prerogative as heretofore" means that there is not any intention of divesting the Crown from any power which it had in any of these matters to act itself, as for example where Imperial interests may be involved. It must be remembered that when a power to legislate is given by the Imperial Parliament, it divests the prerogative so far, but only so far, as to allow the exercise of the legislative power. All the limitations in section 1 of the Act in question are to be read into section 2, which section is as applicable to sentences of fines as of imprisonment, and these fines might be made payable to the Commissioner of Crown Lands, or to some other functionary and not to the Sovereign at all. This section, however, gives no power to remit a sentence under a Dominion Act. What its latter part refers to are ante-confederation Acts creating offences not dealt with by subsequent Ontario Acts, or it may be to common law offences. This is not an Act as to the office of Lieutenant-Governor, within the meaning of B. N. A. Act, sec. 92, sub-sec. 1, which has reference to the position of the Lieutenant-Governor as a link between the Province and the Dominion, such power as he holds as a federal officer. But if we are to enter into the considerations suggested, and to minimize guarding provisions, we must investigate

Argument.

the scheme of the Provincial constitution under the B. N. A. Act. The Provinces are not mere major municipalities. In the B. N. A. Act we find, after the Executive power, and the Legislative power of the Dominion have been dealt with, the heading "Provincial Constitutions," which imports governmental power. Then comes the heading "Executive power," exactly the same as in the case of the Dominion. The very name "Lieutenant-Governor," implies that he is in the place of the Governor-General, who represents the Queen. He uses a great seal, the sign of Sovereign power, by which the Sovereign speaks: B. N. A. Act, sec. 82. The Regal power is a unit. The Province has an Attorney-General, who is the officer representing the Queen in the Courts according to theory of the English Constitution.

The words "subject to be abolished or altered," were inserted in sections 12 and 65 of the British North America Act, *ex majore cautela*, to prevent its being said that being vested, they could not be altered. That the powers may be added to in the same class is clear. The Provinces have legislative powers conferred not only by section 92, but also by sections 93, 95 and 65. In all cases they legislate in the Queen's name; and in the British North America Act, sections 83 and 84, we find constitutional rules applied to constitutional governments.

The legislature concerned with the making of the laws, and imposing fines and punishment, can provide for the remission of the sentence, which is really a part of the administration of justice. The judicial committee has held that our Provincial Legislatures can delegate their powers. Therefore they can delegate the power of remitting fines and pardoning sentences to some one else: *Hodge v. The Queen*, 9 App. Cas. 117; *Bank of Toronto v. Lambe*, 12 App. Cas. 575; *Regina v. Frawley*, 7 A. R. 246, S. C. 2 Cart. 576. When power to legislate is given, power to enact everything executive or administrative necessary to carry it out is implied. The executive government of the Provinces is a matter inextricably interlaced with their

legislative power. I may refer here to an article on the *Argument. Prerogative of the Crown and Colonial legislation*, by Mr. Thomas Hodgins, which appeared in the *Canadian Monthly* for 1880, vol. 5, p. 385. It deals with the exercise of the prerogative power of the Crown by the old Colonial Governments, and shews that even under the most democratic forms of the charter and proprietary governments, where free-holders elected their own governors, even such governors, though so very mediately the representatives of the sovereign, exercised all those parts of the prerogative which were essential to the good government of the country in those days. As facilities for communication between the central seat of the Empire and this continent have increased, we seem, perhaps more in sentiment than in fact, to have gone back rather than forward in vague notions as to the exercise of the prerogative of pardon. I also put in as part of my argument as to the executive power of the Province, the despatch of the Attorney-General of Ontario as to the appointment of Queen's counsel: Turning to judicial decisions, *Théberge v. Laudry*, 2 App. Cas. 102, at p. 108, *S. C. 2 Cart. 1*, at p. 9, may first be referred to. There the judicial committee attached importance to the fact that the Crown had assented to, and was therefore a party to the Act of the Quebec Legislature in question; and though they reiterate the principle that the Crown prerogatives cannot be taken away, except by express words, it is clear the prerogative as to hearing appeals in civil cases was as much minished by the Act in question, as if it had been taken away after once coming into existence. The form—the question—whether the Crown's name should be mentioned as enacting in Provincial Acts, has nothing to do with it. The question of whose Act it is, is not affected. The general and great cardinal and fundamental principle is that of the unity of executive authority, and of the presence of the Queen in all parts of her Dominions, and with reference to everything which is in the nature of the exercise of sovereign power. That presence is indicated by the fact that the

Argument. Lieutenant-Governor is in the Queen's name to summon the Legislative Assembly which is to pass the Acts: (B. N. A. Act, sec. 82). The form of the enacting part of the Acts has nothing to do with the question whether the Crown is there or not. [BOYD, C.—In the old Colonies some used the name of the Queen, and some did not.]

Yes. At all events no Court would say that the Acts are void because the Queen's name is there. The next case *Queen v. Amer*, 42 U. C. R. 722, S. C. 1 Cart. 722, as to the issue of Commissions of Assize, and the view of WILSON, J., seems to have been that here we had got to one of the dividing lines. Was it the creation of the Court, or was it the appointment of the Judge? And the matter was afterwards made right by both the Dominion and the Provincial Governments issuing the commissions. Next is *Queen v. Bennett*, 1 O. R. 445, S. C., 2 Cart. p. 634, as to the power to appoint police magistrates. It was held that such power was not implied either in the Lieutenant-Governor or the Governor-General, but that the Legislature which had to do with the creation of the Courts, and the magistracy under B. N. A. Act, sec. 92, sub-sec. 14, which could create the status of the officer, must have the implied power of giving to the executive the power of appointment. The theory of the case is, that the power of legislation gives the power of legislating so as to make your law thoroughly effective in all its parts. No reference as to the power of appointing police magistrates is found in the B. N. A. Act, because this power was necessarily a part of the legislative authority. This is the principle of the construction of the B. N. A. Act, which it seems to me is the solution of the whole difficulty.

Then there is the case of *Wilson v. McGuire*, 2 O. R. 118, S. C. 2 Cart. 665, as to Division Courts, where it was clearly the opinion of HAGARTY, C.J., and is, I think, quite clear on principle, that as the Ontario Legislature could abolish the Division Court, and re-create it, so it could alter its constitution in any way, and could not merely give to a County Court Judge by his title of Judge or otherwise his power

to preside, but could take away the power of all the Division Court Judges, and give the power to other Judges who should be appointed by the Province. Argument.

I will next refer to *Attorney-General of Ontario v. Mercer*, 5 S. C. R. 536, *S. C.*, 3 Cart. 16, and wish to make part of my argument in this case my statement at 5 S. C. R. p. 577. I refer also to the argument of Mr. Bethune, Q.C., *ib.*, at p. 589, and of Mr. Loranger, *ib.*, at pp. 598 and 603. As to the judgments, I cite first from Ritchie, C. J., 5 S. C. R. 635-6, *S. C.*, 3 Cart. at p. 26 *seq.*, where he discusses the executive government of the Provinces under the B. N. A. Act, and shews that the executive government of the Provinces, as exercised by the Lieutenant-Governors and Executive Councils until altered by the respective Legislatures, continue as before Confederation, except so far as the executive powers conferred on the Governor-General over the Dominion of Canada may interfere. He holds, also, that Lieutenant-Governors do represent the Queen, as they did before Confederation, in the performance of all executive administrative Acts now left to be performed by Lieutenant-Governors in the Provinces in the name of the Queen; and points out that among the enumerated classes of subjects over which the legislative power of the Dominion of Canada extends, there is not to be found one word expressing or implying the right to interfere with Provincial legislative authority or property or its incidents; while from the words "except as regards the office of Lieutenant-Governor," in class 1, of section 92, he draws the inference that as the Lieutenant-Governor under certain circumstances and in certain matters having reference to Provincial administration represents the Crown, the Provincial Legislatures are not permitted to interfere with this office. But this does not mean that you may not take away some of the prerogatives, because that right is expressly given; nor that you may not add to the prerogatives, which is adding so far to the power nominally and substantially of the Crown. Within the scope of the executive and legislative powers confided to the Dominion and

Argument.

Provinces respectively, they are separate and independent, neither having any right to interfere with or intrude on those of the other: *per* Ritchie, C. J., 5 S. C. R. at p. 643 *seq.* S. C., 3 Cart. at p. 33 *seq.* The Privy Council, indicate clearly in this case their view that high political powers and responsibilities were vested in the Provinces by the Confederation Act; and every indication that has been given by the Court of ultimate resort has been an indication of the sovereign character of the Legislative power of the Provinces, and an indication that it extends to a complete and ample, and full form of government according to the British system, and, therefore, to a correlative, consummate, and complementary executive power. So let us take it. On this point I refer to the passage of the judgment of the Privy Council in *Attorney-General v. Mercer*, 8 App. Cas. at p. 778, S. C. 3 Cart. at p. 14, as to the meaning of "Royalties" in B. N. A. Act s. 109. "All lands, mines, minerals and royalties," belonging to the Provinces at the union shall continue to belong to them. They say the general subject of the whole section is of a high political nature; it is the attribution of Royal territorial rights for purposes of revenue and government to the Provinces in which they are situate or arise. I ask you to apply that language in its sense and spirit to almost every clause of this Act which deals with the question of the Provinces. That is the spirit in which you are to construe it. Not a narrow and contracted spirit, but a broad spirit, what I think I may call founded upon the demonstrable proposition, that if the Constitution of Canada itself, the Federal Constitution, is rightly to be described by these words and in this spirit, the Constitution of each of the Provinces is equally to be described in these words and read in that spirit. The Privy Council point out in this case that revenue is of itself a real attribute of sovereignty. They hold that the lands are Crown lands, the revenues Crown revenues, the rights Crown rights, as they always were; but that the power to govern, possess, and enjoy for the use of the particular locality being vested in

that which is a government and a legislature with an Argument executive head created by Her Majesty, that Government and Legislature has the right to control these prerogative rights.

Then there is the case of *Regina v. St. Catharines Milling Co.*, 13 A. R. 148. See Burton, J. A., at p. 166 *seq.*; per Patterson, J.A., at p. 171 *seq.*, who observes: "The administrative and legislative functions I take to be made co-extensive by the Act (sc. B. N. A. Act), as indicated by, *inter alia*, section 130. In 14 App. Cas. 46, is the judgment of the Privy Council in the same case. See at p. 55 *seq.*, where they speak of the B. N. A. Act having restored Upper and Lower Canada to the condition of separate Provinces under the titles of Ontario and Quebec. I endeavoured to direct the special attention of the Court to that theory of the construction of the Confederation Act which is indicated by the word "restoration." That it was an existing entity, the old Province of Canada restored to its former Provincial condition of Upper and Lower Canada that was being dealt with, They held that wherever public land with its incidents is described as "the property of," or as "belonging to" the Dominion or a Province, as the case may be, these expressions merely import that the right to the beneficial use or to its proceeds has been appropriated to the Dominion or the Province as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown. What followed from the legislative power so granted? This, that the Legislature had the right to divest the Crown of its legal title. And in the following year, in its first session, the Legislature passed an Act vesting absolutely the whole of the lands of the Province of Ontario,—the Crown lands of the Province of Ontario,—in a corporate political body,—the Commissioner of Crown Lands. You see here the great prerogative of enjoying and dealing with the lands of the Crown in most ample manner,—of divesting the Crown, of taking the Crown prerogative, all implied in the legislative power to deal with the land. I refer also to pp.

Argument. 57 and 60, where their Lordships held that the whole transaction embodied in the treaty of 1873, was between the Crown and the Indians; and that the surrender was made to the Crown. Now those who take a low view of the Provincial position, might well suppose that a treaty which was made by the Dominion government in its capacity of the representative of the Crown with the Indians, which in form was for the Crown purposes, which in form was to the Dominion government, which in form was for the use of Her Majesty, was a treaty which vested the land in the Crown as represented by the Dominion. What do the learned Judges say: "Even if its language had been more favourable to the argument of the Dominion upon this point, it is abundantly clear that the commissioners who represented Her Majesty, whilst they had full authority to accept a surrender to the Crown, had neither authority nor power to take away from Ontario the interest which had been assigned to that Province by the Imperial Statute of 1867." So that they held that that interest was surrendered to the Crown in right of Ontario; that the interest which the Dominion government had negotiated for, and were paying for, and which they had caused to be released to the Government of the Dominion in the habendum, was a grant to the Crown, and a grant to the Crown in the right of the Province of Ontario. I would refer to some references to the respondents' argument in that case—viz., at pp. 5 seq. 26, 27, 35.*

As to the opinions of two of the Judges in *Lenoir v. Ritchie*, 3 S. C. R. 575, S. C. 1 Cart. 488, as to the appointment of Queen's Counsel, referred to on the other side, they were entirely *obiter dicta*, for the ground on which the case was disposed of was that the true result of the Act in question, and of the action of the Lieutenant-Governor under it, was not to affect the precedence which was called in question. The then Minister of Justice, however, Sir

*Published by the Press of the "Budget," 64 Bay Street, Toronto, 1888.

J. Macdonald, held in the despatches already referred to, **Argument** and the law officers of the Crown were of the same opinion, that although, in his opinion, the Lieutenant-Governor had no implied power to create Queen's Counsel, or to give precedence or pre-audience, yet that the legislature had by right of its power over the organization of the Courts, and the administration of justice, the right to invest him with that authority, not interfering with the prerogative of the Crown. In this view, then, we find another example of my general principle. And lastly I refer to the printed argument in *Queen v. Wason*,* 17 O. R. 58, 17 A. R. 221, and the judgments of all four Judges of Appeal who support this principle, and hold that criminal procedure does not include procedure to enforce Provincial laws, because to hold the contrary would be to lame the Legislature, to render it impotent, to make it dependent on the good will of another legislature which by not providing the procedure, might leave the law ineffective. If we are to lay down a fundamental principle which we say cannot be subverted with reference to the B. N. A. Act, it is this, that the powers given to these Legislatures, whether Federal or Provincial, are to be construed (except to the extent to which they are directly minished or shortened by the language of the Act) in the sense which will enable the Legislature thoroughly, effectively, and completely to discharge the whole of the duties with which it is clothed. I do not find in the B. N. A. Act the implied power expressed, but I find the abstraction of that implied power plainly stated where such an abstraction is intended. What is not abstracted subsists.

Now as to the prerogative of pardon, Anderson (Dict. sub voce) defines "pardon" as "an Act of grace proceeding from the power entrusted with the execution of the law which excuses the individual on whom it is bestowed from the punishment the law has inflicted for the crime he is convicted of." According to this and other definitions

*Published by the Budget Printing and Publishing Co., 64 Bay Street, Toronto : 1890.

Argument. "pardon" proceeds from the power entrusted with the execution of the law, whatever the head of the executive power may be. In the broad sense, it is a part of the administration of justice, though I do not say it follows that, under our arbitrarily framed distribution of powers in which criminal law and procedure rest with the Dominion authorities, the power of pardon goes in its entirety to the local legislature. See also 1 Show. p. 284, cited in Tomlin's Law Dict., sub. v. "pardon"; *King v. Parsons*, Holt's Rep. p. 519. The King mingles mercy with justice, but it is mercy conformable to justice, not arbitrary. On the whole subject, see American Law Reg., N. S., vol. 8, p. 513 *seq.* It has never been doubted that the King's prerogative of pardon might be controlled by Act of Parliament as *e. g.* 31 Ch. II., ch. 42. I refer also to Crim. Law Mag., vol. 6, p. 459, and 27 Hen. VIII., ch. 24, as to the power of pardon claimed by the Lords of the Marshes. [BOYD, C.—The pardoning power has relation to that part of the public against which the offence is. That seems to be the theory.] Yes, and here it is the Ontario public that is alone affected, the Ontario Legislature that legislates, the Ontario justice that is being administered, and the Ontario mercy that ought to be administered. There is the power of pardon in the local authorities by indirect means. The Crown may enter a *nolle prosequi*. Crown officers may take the responsibility of not offering evidence. The public notions have in times past been confused by two things, one being an idea that this prerogative of mercy was in some sense personal to the Sovereign, or more personal than other prerogatives. Striking and dramatic events connected with the exercise of this prerogative in times past led to this erroneous idea. Besides we admit that the British constitution grows, and with reference to this prerogative, as to that of honour, there has been a steady advance in the true recognition of the responsibility of government. The power of pardon is exercised on responsibility, upon principles defined as well as such cases admit, and is the act of the Home Secretary. The other

confusing idea had reference to us as Colonies and colonists, *Argument* that for us, it was important that there should be—I do not say monarchical—but Imperial superintendence. Besides it is right to preserve by express recognition in the last resort the power of the Queen on the advice of Her Imperial Ministers, to pardon where the interests of the Empire of Great Britain in their view demanded such a course. It is not necessary to talk of legislation, or even of active discussion, as indicating the fluctuating character of the prerogative, and its gradual changes and limitations. And no more important and pregnant instance of this fluctuation can be given than that of the greatest prerogative of all—the prerogative of refusing to assent to bills—the veto power of the Crown.

I may refer to the correspondence as to the disallowance of Provincial Acts, as immediately connected with this question of the prerogative of pardon: Sessional Papers, Canada, 1876, No. 116; also to Sessional Papers, Canada, 1877, No. 13, where the prerogative of pardon is discussed. As Minister of Justice, I successfully resisted the suggestion that the Governor-General shall be instructed to act independently of his Ministers in extending or withholding pardon in criminal cases. We have throughout in our correspondence with the Imperial authorities been concerned with crime, which is outside Provincial jurisdiction, but there has resulted a full development of the view that in all matters which affect the Canadian people only, the prerogative of pardon, stands on the same basis here as in England, as unquestionably and indisputably one of those prerogatives of the Crown which are held in trust for the people, and exercised only on advice. Are you then going to take a logical, satisfactory, plain principle of interpretation of the constitution, having regard to the two Sovereignties, the two sets of powers existing, and hold that where you find Sovereign powers given, you find them bestowed on the Sovereign authority in a spirit of complete and exhaustive efficiency? If so, you will probably determine, that as to Provincial Acts having reference to acts

Argument.

which affect only the peace of the Province, the power of pardon in such matters is within the Province as well: that under the B. N. A. Act there is an express or implied vesting in the Province of those executive powers which are essential to complete the Legislative powers, and that there is indisputable power in some instances, and I say in all instances within the domain of Provincial legislation of affecting the Royal prerogative.

I may also refer to the following statutes as recognizing what may be called a double-headed power of pardon in the Queen and in the Governor, Lieutenant-Governor, or person administering the government of the province for the time being: Imp. 3 & 4 Vict. ch. 35; 4 & 5 Vic. ch. 24, (C.); *ib.* ch. 25, sec. 61; *ib.* ch. 26, 27; C. S. C. ch. 99, secs. 112, 113; 32 & 33 Vict. ch. 29, (C.) secs. 125, 126; R. S. C. ch. 181, secs. 38-139.

There are certain other statutes to be referred to: R. S. C., ch. 181, sec. 40, which contains the Dominion legislation as to commuting a sentence of death: R. S. O. 1887, ch. 1, secs. 30, 31, 32, 33, which provide that penalties and forfeitures not otherwise provided for, are to go to the Crown for the public service of the Province, and form part of its consolidated revenue fund. If so, then who shall remit them? Shall the Governor-General have power to take part of the revenues of Ontario and remit them? Then there is R. S. O. 1887, ch. 20, secs. 25-27, providing that the Lieutenant-Governor may remit any duty or toll payable to Her Majesty under any Act relative to the collection of the revenue, etc.; and lastly, the Act respecting the remission of certain penalties: R. S. O. 1887, ch. 90. These Acts which I have referred to are substantially re-enactments of statutes going as far back as 11 Geo. IV., ch. 1, and 7 Wm. IV., ch. 14, sec. 5, carried on by different legislatures and kept alive. In R. S. O. 1887, ch. 90, we get the principle that remission is part of the administration of justice. This legislation has not been excepted to; and the express language of the Act now in question rebuts the suggestion that it must necessarily mean more than the

old Acts, for it provides that nothing in it shall be construed to mean that the Governor had not the whole of the powers referred to already. Argument.

In reference to the meaning of certain expressions in the B. N. A. Act, to which I alluded, the following may be cited: Worcester's Dictionary sub. v. "Great Seal," "Lieutenant," "Lieutenant-Governor," "Executive." The three parts of Government, the legislative, the executive, and the judicial, all have relation to one another, and their powers are commensurate the one with the other. If there is a grant of legislative power to do a thing and an executive power is also created, that executive power has or can be given all authority to do those parts of government appropriate to make efficient and complete the legislative action. I may refer also to Worcester's Dictionary sub. v. "Executive." The local legislature can alone amend, modify or repeal its Acts providing for penalties, and in fact it does modify them in cases to which this Act shall apply, in accordance with general constitutional principles, by the act of its own executive, which acts upon the responsibility of its own ministers; and thus we have the principles of the British Constitution, fully, fairly, clearly and satisfactorily applied, and carried out; and it is the principles of the British Constitution which by the preamble of the B. N. A. Act are to govern the the whole statute. Every word, every letter, every set of provisions is to be interpreted by the light of the principles of the British Constitution. They are the principles which I have endeavoured to describe, and according to those principles it is impossible to come to any other conclusion than that this is a valid Act.

Æ. Irving, Q. C., on same side, did not address the Court.

Robinson, in reply. We dissent very little, if at all, from the general principles laid down as applicable to the constitution of this country. It is impossible to dispute, I think, that the Provincial Legislatures have all implied powers which are essential and necessary to the carrying

Argument. out of the expressed powers given to them, under the different heads in which such powers are enumerated. I may refer to *McCulloch v. State of Maryland*, 4 Wheat. 316; *Leprohon v. City of Ottawa*, 3 A. R. 522; *S. C.*, 1 Cart. 592; *Bank of Toronto v. Lambe*, 12 App. Cas. 575. But the Court should not strain too far to give an Act validity, because they may thus throw on the government the necessity of exercising the veto power, which is always regarded with suspicion and jealousy. As to our having a constitution similar in principle to the British, it is impossible to say that we have it. [BOYD, C.—That is Mr. Dicey's view.]* How can our legislatures be said to be supreme, when it devolves upon Courts to decide whether, when in their judgment they are acting within their power? Yet, at p. 67 of his work, Mr. Dicey says that the doctrine of the legislative supremacy of Parliament is the very keystone of the law of the constitution. [BOYD, C.—Is not the responsibility of the executive to Parliament really the essence of the thing, as distinguished from the American system?] Possibly so. No doubt our legislatures are supreme when they act within their own jurisdiction, but that is very different from the supremacy of the Imperial Parliament. [Blake.—They can do what they will with their own.] Yes, but they have not the power of deciding what is their own. Practically the Court is supreme in this country, and not the legislature. It is the judicial power which decides upon the validity or invalidity of an Act of Parliament, which is simply reversing the British Constitution. [BOYD, C.—It is inherent in all written constitutions.] Then it results that the essential principle of the British Constitution is that it is not a written one. Now we concede that if the power to pass the Act in question, is necessarily incident to any of the enumerated powers of the Local Legislature, then they have such power. The question is are the local legislature enacting within any of their enumerated powers. As to local and private matters within the Province (B. N. A. Act, sec. 92, s. 16)

*See Dicey's *Law of the Constitution*, 3rd ed., p. 155.

I submit that relates to Acts respecting private matters, Argument and matters extending to a locality less than the Province, for all Acts are local Acts in the Province. It was added, I apprehend, as a sort of complement to the various other heads.

Monkhouse v. Grand Trunk R. W. Co., of Canada, 8 A. R. 637; S. C., 3 Cart. 289, was a case of very different legislation to what we have in the case in question. There the railways about which the legislation was were well defined, viz., the railways over which the Province of Ontario has jurisdiction. Then the power of pardon given certainly does extend to imprisonment as well as fines and penalties and the Act may be good so far as it confers power of pardon in the one case, but bad so far as they confer it in the other. [BOYD, C.—Have the Courts gone so far as that. ?] I submit that where an Act purports to give a power, and as to one of the subject matters that power is invalid, and as to the other valid, the Court has to say so. At all events what difference can the words “So far as this Legislature has power to enact,” make? They always enact only as far as they have the power. We must assume that to be their intention, and adding such words cannot affect the character of the Act, except to shew that they have doubts as to their power. [Blake.—Supposing you have a hundred different items, and the Legislature has really only power in one, and we enact with this general statement,—“so far as we have power,” it is valid as to the one.] If the mere addition of such words is an answer to an attack on the validity of a statute, it is only necessary to put that in, and we cannot attack the validity of any statute except as the question comes up. If so, what purpose is served by the enactment of the Judicature Act under which we are proceeding: R. S. O. 1887, ch. 44, sec. 52, sub-sec. 2. We submit that this Act does not come within the words “administration of justice,” under any fair construction of those words, any more than an Act respecting the appointment of Queen’s Counsel which the law officers of the Crown have expressed the opinion does not come under that head.

Argument.

As to section 1 of the Act in question, we say the Provincial Legislatures have no power to do more than give the executive power in connection with some one of the subjects committed to their charge, on which they are legislating; in other words there is no power to regulate the extent of the gift of executive power within the Province as a detached subject by a separate enactment. They can give only such executive power as is necessary to make their legislation effective.

As to the Lieutenant-Governor representing the Queen, all that can be said on that subject with confidence is, that he represents the Queen in a modified manner, and in exceptional cases; it is impossible that he is for all purposes the direct representative of the Queen at all: *Lenoir v. Ritchie*, 3 S. C. R. at pp. 613, 623, 634, S. C. 1 Cart. at pp. 519, 528, 529, 541-5; *Attorney-General of Quebec v. Attorney-General of the Dominion*, 2 Q. L. R. at p. 180, S. C. 3 Cart. at p. 114; *Attorney-General v. Mercer*, 5 S. C. R. 711, S. C. 3 Cart. at pp. 83, 4; *Regina v. Amer*, 42 U. C. R. at p. 407-8, S. C. 1 Cart. at p. 740. As to the power of Provincial Legislatures being restricted to their enumerated powers: *Citizens Ins. Co. v. Parsons*, 4 S. C. R. at p. 333, S. C. 1 Cart. at p. 338; *City of Fredericton v. The Queen*, 3 S. C. R. at p. 536, S. C. 2 Cart. at p. 35; *Gibson v. McDonald*, 7 O. R. at p. 424, S. C. 3 Cart. at p. 334.

September 6th, 1890. BOYD, C. :—

This action is brought under section 52 (2) of the Judicature Act, (R. S. O. ch. 44,) for a declaration touching the validity of the Statute of Ontario, passed in 1888, (51 Vict. ch. 5) entitled "An Act respecting the executive administration of the laws of this Province."

The validity of Provincial legislation depends upon its being *constitutional*, using that word in a strict sense—namely, whether as the expression of the will of an inferior political assembly the given law transcends or is within the compass of delegated power.

Judgment.

Boyd, C.

In relation to the supreme authority of the British Parliament, Canada, in its composite character, forms a complete and separate subordinate government, possessing a "central legislation" for the whole Dominion and "local legislatures" for the several members of the Colonial union. These various legislatures hold in sub-division among them, powers applicable to all classes of subjects and to every purpose of government required for the entire territory and its several provincial parts; but as between the Dominion and the Provinces, each is an incomplete or limited government, having exclusive jurisdiction over certain enumerated classes of subjects, defined in general terms by the Imperial Constitutional Act. Barring, however, this delimitation of area, the Parliament of the Dominion and Legislatures of the Provinces enjoy, each in its own sphere and territory, delegations of sovereign power sufficient for all purposes of effective self-government.

Passing by, as not of present relevance, the right of supervision touching Provincial legislation entrusted to the Dominion Government, which works in the plane of political expediency as well as in that of jural capacity, the question for the Court is, whether the particular enactment is within the range of governmental powers exercisable by the local legislature under the British North America Act.

At the outset there are some recognized rules of guidance to be observed in passing upon the exercise of legislative powers. Comment was made upon the ambiguity of the Act, the difficulty of ascertaining what was covered by its general language, and upon the need of showing plainly that the limited jurisdiction prescribed by the written law had not been exceeded. But so far as frame and phraseology go, the result of ancient observation—"Jurisconsultus non curat de verbibus"—avails for modern makers of the law. Language, large or loose, is to be shaped by presuming an intention to act with candour and within the bounds of constitutional competence.

Judgment.
Boyd, C.

Vague or ambiguous expressions are to be read so as to support rather than to invalidate what is promulgated, and the Court, in case of reasonable doubt, will refrain from pronouncing against the statute.

The Act is full of cautionary phrases—saving the royal prerogative and limiting its provisions to matters within provincial jurisdiction. After reciting sections 65 and 92 of the British North America Act, the first section provides for vesting in the Lieutenant-Governor all powers, &c., exercisable by Governors and Lieutenant-Governors of the several provinces before Confederation, under commissions, instructions, or otherwise. Section 65 of the Imperial Act had already vested in the Lieutenant-Governor all suitable executive powers derived from statutes, and this present Act aims at an extension in the same line, so as to clothe the chief executive officer of Ontario with all suitable powers, &c., derived from other than statutory sources.

It is, perhaps, impossible to say how much ground this covers: it may be that (apart from what is specifically named in the next section) not a single appropriate power exists outside of statutes, which will fall within the purview of this enactment. But its vague comprehensiveness does not make it void if there be suitable powers in matters within the jurisdiction of the province which are thus annexed to the executive office. And, again, if the section operates on nothing, it may be innocuous, but it is not unconstitutional. We are not called upon by analysis or criticism of possible powers and functions which may be embraced in the words used to discriminate as to what are within and what without the scope of the enactment: any particular case is to be dealt with as and when it arises.

But it was urged that the 65th section permits the province to work change in the powers, &c., annexed to the executive office only by *abolition* or *alteration*, and not by *addition*. The Imperial Act speaks of statutory powers, and the right is recognized to deal with and modify all prior colonial, but not imperial, legislation on this

subject. No restriction appears to be imposed or intended on the freedom of local legislation in attaching further proper powers and functions to the office of the Lieut-Governor, provided only that it does not transcend the limits of legislation assigned to the province: *Dobie v. Temporalities Board*, 7 App. Cas. at p. 147. As to all subordinate law making, it is a general principle not without point as to this phase of the discussion, that though such laws may be *præter* the general law of the realm, they cannot be *contra*: *Bac. Abr.*, Tit. "By-law." But even in rigorous construction "to alter," would include "to add." Alteration may be by addition or subtraction. For instance, in Dr. Murray's Dictionary, the former verb is defined "to make some change in character, shape, condition, position, quantity, value, &c., without changing the thing itself for another." No change is here aimed at in the office as such; but rather important and congruous functions are sought to be added thereto, to be administered by that chief public officer, by whom, through the Dominion, the province is connected with the Queen.

Judgment.
Boyd, C.

What has just been said, answers also the argument based upon section 92, sub-sec. 1 of the Imperial Act, which forbids interference with the office of Lieut-Governor. That veto is manifestly intended to keep intact the headship of the Provincial Government, forming, as it does, the link of federal power; no essential change is possible in the constitutional position or functions of this chief officer, but that does not inhibit a statutory increase of duties germane to the office.

I pass from the generalities of the first to the second section which gives point to the former by indicating that it is meant to include the power of commuting and remitting sentences "for offences against the laws of the province or offences over which the legislative authority of the province extends." These last words (much criticised during the argument) may be fairly read as *in puri materiâ*, with like expressions in R. S. O. 1887, ch. 89 and 90. Statute ch. 89 provides for the application of fines

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where by any Imperial statute in force in Ontario, a fine is imposed in respect to matters within the legislative authority of Ontario. Statute ch. 90 provides for remission of penalties by the Court in cases where such forfeiture is imposed by any Act of the province, or by any other Act now in force in the province within the legislative authority of the province. That is to say, the words criticised apply to existing laws enacted by the province, or to laws operating therein passed by (old) Canada or Great Britain in regard to matters which fall within those assigned to provincial legislation by the British North America Act. All such former laws are continued by section 129 of that Imperial Act, and instead of further specification, they are thus by allusion comprehended in section 2 of the Act in hand, in order that the executive of Ontario may possess like power *quoad* all penal enactments which are or might be of provincial competence.

In the political aspect it is a fitting thing, if permissible, to bestow this dispensing power upon the chief executive of the body wherefrom the legislation that is sought to be arrested emanates. As put by Maine, the theory of justice ended in the doctrine that the chastisement of offences belonged in an especial manner to the sovereign as representative and mandatary of his people. Whence it followed that the power reserved as an ultimate remedy for the miscarriages of law in the prerogative of pardon, was universally lodged with the chief magistrate of the particular State: Ancient Law, 3rd Amer., from 5th Lond. ed., pp. 368, 382.

According to the British constitution, pardons may proceed from the Crown by virtue of its prerogative, or from Parliament, the more comprehensive body, in the exercise of its supreme authority. The pardoning power as exercised by the Crown, has certain legal limitations, among which those of immediate pertinence are exceptions which exist to the remission of penalties where the offence savours more of a private or localized grievance to individuals than of a public wrong: 2 Hawk, P. C. ch. 37,

sec. 33; 3 Inst. at p. 234. But in the "omnipotence of parliament," dispensations may be granted by statute, general or special, which are all-embracing in their effects exempting from punishment, not only as to the public, but as to sections of the community, and as to individuals particularly aggrieved. Modern instances of this class of legislation are to be found in various Acts of Amnesty and Indemnity passed even by Colonial powers, many of which are collected in *Phillips v. Eyre*, L. R. 4 Q. B. 225, and specially analogous to the statute now in hand, is the Imperial Act of 1859, to be hereafter further mentioned.

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Boyd, C.

Now, it is a well settled principle of public law, that after a colony has received legislative institutions, the Crown (subject to the special provisions of any Act of parliament) stands in the same relation to that colony as it does to the United Kingdom: *In re the Lord Bishop of Natal*, 3 Moo. P. C. C. N. S. at p. 148. Effective colonial legislation as to pardon may be attributed to the fact that the Crown is a constituent of the local law-making body; but it is contended such is not the case as to Ontario. Though as compared with the Dominion, the mechanism may be different, and no direct or immediately representative co-ordination of Queen and people may exist in the Provincial Assembly, yet sovereign power must substantially operate and be manifested in Ontario legislation in order to the efficient exercise of territorial government under the sanctions of the Imperial Act. The power to pass laws implies necessarily the power to execute or to suspend the execution of those laws, else the concession of self-government in domestic affairs is a delusion. Sovereign power is a unity, and though distributed in different channels and under different names it must be politically and organically identical throughout the Empire. Every act of government involves some output of prerogative power. The prerogatives of the Crown may not have been in any sense communicated to the Lieutenant-Governor as representative of the Queen; and yet the delegation of law-making and other sovereign powers by

Judgment. the Imperial Parliament to the Legislature of Ontario, may suffice to enable that body by a deposit of power to clothe the chief provincial functionary with all needful commuting and dispensing capacity in order to complete its system of government. That this "quality of mercy" is an indispensable constituent in human governments, nearly all publicists acknowledge. I will cite, however, but one suggestive passage from Vattel: "The very nature of government requires that the executor of the laws should have the power of dispensing with them, when this may be done without injury to any person, and in certain particular cases where the welfare of the State requires an exception. Hence the right of granting pardons, is one of the attributes of sovereignty. But in his whole conduct, in his severity as well as his mercy, the sovereign ought to have no other object in view than the greater advantage of society: The Law of Nations, Bk. i. ch. 13, sec. 173.

Boyd, C.

The Lords of the Judicial Committee have accentuated the provincial powers of self-government by repeating in *Powell v. Apollo Candle Co.*, L. R. 10 App. Cas. at p. 289, what they had before decided in *Hodge v. Reg.*, 9 App. Cas. 117, in these words: "When the British North America Act enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample, within the limits prescribed by section 92, as the Imperial Parliament in the plenitude of its power possessed or could bestow. Within these limits of subjects and areas, the local legislature is supreme, and has the same authority as the Imperial Parliament." Very recently the Court of Appeal for Ontario in *Regina v. Wason*, 17 A. R. 221, has held valid provincial enactments imposing penalties for the non-observance of directions and requirements of the

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legislature on subjects of a local character. That is to say there is a theoretically well-defined line of provincial penal legislation, which does not trench on the region of criminal law as controlled by the Dominion Parliament. Within this area of provincial penal legislation, there appears to be competence to pass the Act in question, which deals with the commutation and remission of sentences for offences against provincial laws.

The Royal prerogative of pardon is a relic of that power of dispensing with the laws which was restrained within narrow compass by the Bill of Rights in 1688. In its origin the pardoning power arose when crimes began to be regarded as offences against the State, and not as mere injuries to individuals, and when pecuniary satisfaction to the injured became displaced by deterrent remedies affecting the person of the offender. The King being the impersonation or representative of the State, all crimes and misdemeanours affecting the life and security of the subject or the peace of the public were accounted injuries to him. In his name all prosecutions were conducted, all punishments were awarded, and by him all dispensations of grace were granted. This last act of sovereignty proceeded upon the theory that he, the injured person in the eye of the law, could forgive a transgression which was reckoned against himself: 1 Bl. pp. 268 and 269. But concurrently with this royal exercise of mercy, the pardoning power was in use in other quarters when the same reason applied as in the case of the Crown. Thus Earls Palatine and others in virtue of their possession of Royal franchises had a right of pardon within the limits of their local jurisdiction. So the right of pardon was practically held by the prosecutor in the now obsolete proceedings in trials by appeal respecting crimes. He might grant a release which barred all proceedings, and this because one may renounce the benefit of a law which he has invoked in his own favour. The punishment awarded in such appeals the King had no right to remit, inasmuch as it was the party actually injured who had demanded satisfaction: 1 Bl. p. 269; iv. *ib.* pp. 12, 311, 391.

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These reasons still hold good for the new state of affairs presented by the development of self-governing dependencies, and are applicable to the statute under consideration. The local legislation which creates the offence, has power to suspend the sentence, to commute or remit the punishment. It could not be seriously or successfully questioned that in the Act under discussion in *Regina v. Wason*, the legislature might have framed section 8 so as to provide that the penalties therein imposed, should not be enforced in any case wherein the Lieutenant-Governor thought fit to remit the same. If this can be done by proviso or in particular cases, it may be done by direct and general legislation.

Again, the persons affected by breaches of the penal law of the province are, at the widest, the public—not of Canada,—but of Ontario. The exemption from punishment is, therefore, a matter of local and private moment. It is a transaction which concerns solely the people of the province, and as to which responsibility should rest somewhere for the satisfaction of those affected by interruption of the usual course of law. Consider how the prevention of punishment overtaking one convicted, in all cases apparently, in some cases really, frustrates the declared will of the legislator. But according to modern constitutional doctrines, the exercise of clemency should be neither arbitrary nor irresponsible. While it involves the exercise of discretion, that discretion should be quasi-judicial, tempering in proper exceptional cases the infliction of penalty on tangible grounds of humane policy or public morality, much as equity relieved the rigour of municipal law. “For remission of punishment,” writes Bentham, “there may be good reason on various occasions, but they are all of them capable of being, and all of them ought to be specified: Works, vol. ix. p. 37. Interference with the execution of the laws should also be a transaction involving responsibility to the particular legislature and people interested therein. This would be evaded if the Crown as the Dominion executive should arrest the operation of provin-

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cial penal legislation; whereas the Crown as sovereign of Ontario, exercising the prerogative through the chief executive officer of the province, specified for that purpose by the provincial statute, would seem to supply the more appropriate and more constitutional medium of intervention. Is it not then the right course, legally and otherwise, to vest this dispensing power in the chief executive officer carrying on the government of the province, whose ministers and advisers will be answerable for his action? What then prevents this result? Not, it seems to me, because of any encroachment on the Royal prerogative of mercy, whether as defined in the instructions to the Governor-General of Canada, or as otherwise exercised by the Crown under advice. The grant of pardon is under the Royal instructions permitted in the case of those convicted of any *crime*. That word should bear the same meaning as when used in the British North America Act, implying violation of a Dominion statute or of the common law relating to *crime*. So the power of remission thereby authorized, is as to fines, &c., which may become due and payable to the Queen, *i. e.*, to the Crown as representative of the public of Canada.

Now, the scope of the Ontario statute under review, comprehends no more than the case of offenders against provincial statutory law, actual or constitutionally possible; no more than penalties payable to the Crown as representing the province, or to municipalities or to individuals who are aggrieved or who prosecute.

This exercise of provincial legislative power is analogous to that found in recent Imperial legislation, and in particular, 22 Vict. ch. 32, (1859), which in its recital demonstrates that the Royal prerogative is not encroached upon by the Ontario statute in its application to pecuniary penalties. Thus reads the preamble: "Whereas penalties which under penal statutes are made payable to parties other than the Crown, cannot be remitted or pardoned by the Crown, where no express provision has been made by the statute for that purpose, and it is expedient that the

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law as to the remission of such penalties should be amended and made uniform. Therefore," &c. Provision is then made that penalties for offences imposed on a convicted offender, may be remitted by the Crown, in whole or in part, though payable to parties other than the Crown.

The Royal prerogative in its large sense as exerciseable in reference to crime, this statute does not purport to interfere with. In many, if not in most cases, wherein it may be invoked, the punishment will be such that the dispensing power of the Crown could not properly extend thereto. For instance, when the penalty is to be paid, one half to the complainant and the other half to the treasurer of the local municipality in which the offence has been committed, (as was the case in *Regina v. Wason*), well understood legal restrictions exclude the interposition of the Crown. Should the particular instance peradventure be otherwise, and the Royal prerogative right arise, then it is saved by the very words of the Act.

The argument pressed upon us was, that nothing in section 92 of the Imperial statute contemplated legislation in reference to the pardoning power in any case or in any sense however restricted. But this is, I venture to think, resting on the letter of the law, and disregarding the liberal construction to be given to this as a broad constitutional statute conferring and distributing high and large powers of government, both as to Canada and the provinces. It is to be read in the light of history and with a view to adjust its parts to the life and growth of free political communities. The Act is framed both as to the central and local governments, so as to confer "a constitution similar in principle to that of the United Kingdom." That constitutional system embodying representative institutions as well as responsible government, was already enjoyed by the separate provinces before Confederation; and while in certain respects, and as a consequence of the federal union, some ingredients were borrowed from the constitution of the United States, in substance the distinguishing principle of responsibility, which is the essence

of British Parliamentary government, characterizes the British North America Act. In brief, the executive is made accountable to the electorate. Power and responsibility go hand in hand.

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The advisers of the Crown through whom the general and the provincial governments are conducted, must answer for their advice to the popular assembly and ultimately to the people at large as organized for political purposes. All legislation which advances this end, having regard to the distribution of powers in the Imperial Act, is constitutional and legally unexceptionable. Holding in view these and other considerations already advanced or alluded to, I find no difficulty in classifying this statute as one made in relation to the imposition of punishment.

From another point of approach it may be covered by the provisions for the administration of justice in the Province. Bentham's words are appropriate, "What is called mercy is in many cases no more than *justice*: in all cases where the ground of pardon is the persuasion of innocence, entertained either notwithstanding the verdict, or in consequence of evidence brought to light after the verdict:" Works, vol. ii. p. 579. To the same effect an American Judge: "Though sometimes called an act of grace or mercy, a pardon when properly granted is also an act of justice, supported by a wise public policy." O'Key, J., in *Knapp v. Hynes*, 39 Ohio St. R. 377-381. And Bentham says again: "No punishment, no government; no government, no political society. Punishment is everywhere necessary—the application of it is everywhere a necessary part of judicial procedure. But of that same procedure power of pardon is moreover a *requisite* part, that is to say power of arresting the hands of the judge": Works, vol. i. p. 528. I observe also that Prof. Amos in his book on the Constitution, deals with the Royal Prerogative of Mercy under the head of and in connection with "the administration of justice": "Fifty Years of the English Constitution," pp. 427, 428, 435. Other illustrations might

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Boyd, C. will not persuade, if these do not.

The novel question presented on this record, and the earnest arguments addressed to us for and against the legislative capacity of the province as manifested in this instance, have induced me to give at length the reasons which have led to the irresistible conclusion that the statute 51 Vict. ch. 5, should be declared of the constitutional competence of Ontario.

FERGUSON and ROBERTSON, JJ., concurred.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

MARTIN V. MCMULLEN.

*Guarantee—Construction of—Limited suretyship for a floating balance—
Payment of part of debt—Right to rank upon insolvent estate of principal
debtor.*

The plaintiff's testator gave the defendants a guarantee in the following terms: "In consideration of the goods sold by you on credit to M., and of any further goods which you may sell to M. upon credit during the next twelve months from date, I hereby undertake to guarantee you against all loss in respect of such goods so sold or to be sold, provided I shall not be called on in any event to pay a greater amount than \$2,500."

The whole debt owing to the defendants by M. at the expiration of the period limited by the guarantee was \$5,556. M. made an assignment for the benefit of his creditors. The plaintiff paid the defendants \$2,500, and claimed to rank upon the estate of M. in respect thereof:—

Held, STREET, J., dissenting, that the guarantee was a limited suretyship for a floating balance, and was to be construed as applicable to a part only of the debt, co-extensive with the amount of the guarantee; and the plaintiff was entitled to a dividend from the estate of M. in respect of the \$2,500 paid.

Judgment of STREET, J., 19 O. R. 230, reversed.

AN appeal by the plaintiff from the judgment of STREET, *Statement*. J., the trial Judge, in this action, reported 19 O. R. 230.

The action was brought by the plaintiff as the executor of Jonathan Martin for a declaration that he was entitled to rank as a creditor of the estate of the firm of McGachie Brothers, in the hands of the defendant McMullen, the assignee for the creditors of that firm under R. S. O. ch. 124, in respect of a sum of \$2,500 paid by the plaintiff, as such executor, to the defendants Ogilvy, Alexander, & Anderson, in discharge of an obligation created by a guarantee given to Ogilvy & Co. by Jonathan Martin.

The guarantee was in these words:

"In consideration of the goods sold by you on credit to McGachie Brothers of Woodstock, and of any further goods which you may sell to McGachie Brothers upon credit during the next twelve months from date, I hereby undertake to guarantee you against all loss in respect of such goods so sold or to be sold, provided I shall not be called on in any event to pay a greater amount than \$2,500.

Statement. You shall have the right to accept and release collateral securities, to extend the time for payment, take notes or bills in settlement for goods sold or to be sold, and renew the same, compromise, or compound the said indebtedness, either during the said period or afterwards, without notice to me."

The whole debt owing to Ogilvy & Co. by McGachie Brothers, at the expiration of the period limited by the guarantee, was \$5,556.

STREET, J., held that this was a guarantee, not of part but of the whole of the debt, limited in amount to \$2,500, and that the plaintiff was not entitled to rank upon the estate.

The appeal was argued before the Divisional Court (ARMOUR, C. J., FALCONBRIDGE and STREET, JJ.), on the 22nd May, 1890.

McCarthy, Q.C., for the plaintiff. If the words of the guarantee were slightly different, the case would be the same as *Hobson v. Bass*, L. R. 6 Ch. 792. It is practically the same. Lord Hatherley's illustration is not part of the judgment nor necessary to the judgment. I submit this is a guarantee to secure a floating balance, fluctuating from time to time. I refer to *Ellis v. Emmanuel*, 1 Ex. D. 157; *Gray v. Seckham*, L. R. 7 Ch. 680; *Ex p. Holmes*, Mont. & Ch. 301.

Gibbons, Q.C., for the defendants. If Ogilvy & Co. were suing on the guarantee, could the plaintiff claim to deduct from the \$2,500 the dividends received by Ogilvy & Co. on the estate of McGachie Brothers? The guarantee is against loss. The loss is what Ogilvy & Co. were short after exhausting their rights against McGachie Brothers and their estate. The only way the plaintiff can stand in the shoes of McGachie Brothers is by paying the whole debt. Ogilvy & Co. were the only persons who could file a claim against the estate, and they did file one; how can they be ousted from their position? I refer to *Ex p. Turner*, 3 Ves. 243; *Thornton v. McKewan*, 1 H. & M. 525; *Ex p. Rushforth*, 10 Ves. 409.

McCarthy, in reply, referred to *Midland Banking Co. v. Judgment.*
Chambers, L. R. 4 Ch. 398 ; *Paley v. Field*, 12 Ves. 435. Armour, C.J.

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The provision in the guarantee that Ogilvy & Co. shall have the right to accept and release collateral securities, to extend the time for payment, take notes or bills in settlement for goods sold or to be sold, and renew the same, compromise or compound the said indebtedness, either during the said period (*i.e.*, during the next twelve months from date,) or afterwards, without notice to the guarantor, was placed in the guarantee to prevent the doing by Ogilvy & Co. of the things it was thereby stipulated that they should have the right to do, having the effect of releasing the guarantor, and does not affect in any way the construction to be placed upon the preceding part of the guarantee, and such preceding part has, therefore, to be construed as it stands.

No evidence was given at the trial of the circumstances under which this guarantee was given, nor of the state of accounts at that time existing between Ogilvy & Co. and McGachie Brothers, nor whether the guarantor had any knowledge of what was the state of such accounts, so that we have to construe this guarantee without any extrinsic aid.

It is in these words: "In consideration of the goods sold by you on credit to McGachie Brothers of Woodstock and of any further goods which you may sell to McGachie Brothers upon credit during the next twelve months from date, I hereby undertake to guarantee you against all loss in respect of such goods so sold or to be sold, provided I shall not be called on in any event to pay a greater amount than \$2,500."

This guarantee, it will be observed, is limited in point of time, and limited in amount; and the question is whether it is to be construed as a security for a part of the debt of \$5,556 which was shewn to be owing to Ogilvy & Co. by

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It was laid down in *Ellis v. Emmanuel*, 1 Ex. D. 157, as the result of all the authorities, "that where the surety has given a continuing guarantee, limited in amount, to secure the floating balance which may from time to time be due from the principal to the creditor, the guarantee is as between the surety and the creditor to be construed, both at law and in equity, as applicable to a part only of the debt, co-extensive with the amount of his guarantee; and this upon the ground, at first confined to equity, but afterwards extended to law, that it is inequitable in the creditor, who is at liberty to increase the balance or not, to increase it at the expense of the surety;" and it was therein also laid down "that in such a case the suretyship is, *primâ facie* at least, to be construed as a security for a part only of the debt;" and the Court therein also agreed "with what is intimated by Lord Hatherley in *Hobson v. Bass*, that if a creditor, taking a limited security for a floating balance, means it to be a security for the whole of the debt, and not merely for a part, he should take care that this is clearly expressed, for the *primâ facie* construction is the other way, and the Court ought not to split hairs or make nice verbal distinctions on the words used."

The guarantee in this case is a limited suretyship for a floating balance, and is to be construed as applicable to a part only of the debt, co-extensive with the amount of the guarantee.

If such is not its absolute construction, it is certainly its *primâ facie* construction, and there is nothing in the guarantee to rebut such construction.

No doubt, words might have been used in the guarantee to rebut such construction, as in *Ex p. Miles*, 1 DeG. 623; *Ex p. Hope*, 3 M. D. & DeG. 720; *Midland*

Banking Co. v. Chambers, L. R. 4 Ch. 398; and *Ex p. Judgment. National Provincial Bank of England*, 17 Ch. D. 98; *Armour, C.J.* but no such words are used.

I am of opinion, therefore, that this guarantee must be construed as a guarantee for a part only of the debt due from McGachie Brothers to Ogilvy & Co., and that the plaintiff is entitled to the dividends declared, in respect of the amount of such guarantee, which he was shewn to have paid to Ogilvy & Co.

The judgment of the learned Judge will therefore be reversed, and the defendants Ogilvy & Co. will pay the costs of the plaintiff and of the assignee.

I refer to *Ex p. Rushforth*, 10 Ves. 409; *Paley v. Field*, 12 Ves. 435; *Ex p. Brook*, 2 Rose 334; *Burdwell v. Lydall*, 7 Bing. 439; *Raikes v. Todd*, 8 A. & E. 846; *Ex p. Holmes*, Mont. & Ch. 301; *Thornton v. McKewan*, 1 H. & M. 525; *Gee v. Pack*, 33 L. J. Q. B. 49; *Hobson v. Bass*, L. R. 6 Ch. 792; *Gray v. Seckham*, L. R. 7 Ch. 680; *Goodwin v. Gray*, 22 W. R. 312; 1 W. & T., 6th ed., 135.

FALCONBRIDGE, J. :—

The law seems to be settled and reduced to formulæ—some of the distinctions, (e. g., the illustration of Lord Hatherley, L. C., in *Hobson v. Bass*, L. R. 6 Ch. at p. 795), being so subtle as to be confusing to the ordinary mind.

The difficulty is to construe the instrument of guarantee so as to apply the formula.

Was the intention (as gathered from the instrument itself) to guarantee the whole debt with a limitation on the liability of the surety?

Or was the suretyship of the plaintiff only to secure a floating balance?

We are without any assistance *dehors* the document itself.

I understood it to have been admitted at bar that at the

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Falconbridge, already existing which exceeded the limit of \$2,500—if
J. that is material, and I at first thought it might be material,
to the consideration of what ought to be the *primâ facie*
construction of the document. See per Blackburn, J., in
Ellis v. Emmanuel, 1 Ex. D. at p. 168: "There is no case
that I am aware of which lays down that where the surety-
ship limited in amount is for a debt already ascertained
which exceeds that limit, it is *primâ facie* to be construed
as a security for part of the debt only. And I have failed
to see any principle on which such a *primâ facie* construc-
tion ought to be adopted."

But these remarks are not, I see, applicable, inasmuch as
the suretyship here is not merely for that debt, but for
debts to be afterwards incurred.

On the best judgment which I am able to form, having
regard to the limitation of time and amount, I think this
is a limited suretyship for a floating balance, and so it is
primâ facie to be construed as a security for part only of
the debt.

I agree, therefore, with the judgment of the Chief
Justice.

STREET, J. :—

The law applicable to this case, as I deduce it from the
many authorities bearing upon it, may be stated as
follows :—

A surety liable for a whole debt who pays it, or liable
for a part of a debt who pays that part, is entitled, after
the bankruptcy of the principal debtor, to rank upon the
estate in the place of the principal creditor to whom he
was surety.

A surety liable for a whole debt, or for part of a debt,
who pays only a portion of that for which he is liable, is
not so entitled.

A surety who is liable for a whole debt but limits his
liability to a fixed sum, which is less than the sum due the
creditor at the time the surety pays him, is not so entitled

The rule last stated appears to be the residuum of the original principle that a surety who paid only part of a debt could not rank in the place of the creditor, as modified in the interest of the surety by the exception that if he were surety only for the part which he paid, he might rank on paying that part.

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The distinction between the engagement of one who is surety for a part of a debt, and that of one who is surety for the whole with a liability limited to a fixed sum, is exemplified by Lord Hatherley in *Hobson v. Bass*, L. R. 7 Ch. at p. 794, in the two examples which he there gives illustrating the two kinds of engagement; the first being "I will be liable for £250 of the amount which A. B. shall owe you;" and the other being, "I will be liable for the amount which A. B. shall owe you, subject to this limitation, that I shall not be called on to pay more than £250."

In the former of these cases he says the surety paying the £250 would be entitled to rank for it in the creditor's place; in the latter he would not, although in each case the surety would have paid all that he had contracted to pay.

The distinction is extremely narrow, and is one entirely of form and not of substance, so far as the liability of the surety is concerned; it has, however, been recognized as existing, and as being the difficulty to be surmounted by the surety in all the cases from *Ex p. Rushforth*, 10 Ves. 409, to the present time, and it was allowed to prevail in favor of the creditor and to the detriment of the rights of the surety in *Ellis v. Emmanuel*, 1 Ex. D. 157.

It must, therefore, be dealt with as a distinction which is well settled, and to which effect must be given in any case which it clearly governs, because the established rights of a creditor under a particular form of contract would otherwise be interfered with.

It has not been held as governing any of the reported cases which arose from the time *Ex p. Rushforth* was decided in 1806, down to the time that *Ellis v. Emmanuel*

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was decided in 1876. The cases which were decided in the meantime, including *Ex p. Rushforth* also, were all cases in which the debt guaranteed was part of a floating balance, and the guarantee was of a sum limited in amount and less than the amount of the ultimate balance.

From the concurrence of these facts, the Court in *Ellis v. Emmanuel* extracted a rule of construction, viz., that a limited suretyship to secure a floating balance is, *prima facie* at least, to be construed as a security for a part only of the debt.

The rule here laid down, as I understand it, is simply this, that unless the guarantee is upon its face a guarantee of the whole debt, limited in amount, it will be construed to be a guarantee of a part, equal to the amount of the limit fixed; it does not in any respect alter the principle to be applied when the construction of the instrument has been settled; it is only a rule for ascertaining the meaning of the instrument when that meaning is not clearly expressed. In the present case the meaning of the guarantee is, in my opinion, expressed with sufficient clearness to exclude the *prima facie* construction. The material parts of it are as follows:

"In consideration of the goods sold by you on credit to M., and of any further goods which you may sell to M. upon credit during the next twelve months, I hereby undertake to guarantee you against all loss in respect of such goods so sold or to be sold, provided I shall not be called on in any event to pay a greater amount than \$2,500."

The expression "against all loss," should not, I think, be construed as meaning the final balance of the debt after all dividends have been applied in reduction of the debt, although my view was formerly otherwise; because it would follow from that construction that no action upon the guarantee would lie until the final loss had been ascertained; whereas the rule in regard to guarantees in general is the reverse of this, and entitles the creditor to sue the surety immediately upon default made by the debtor unless the instrument expressly provides for the perform-

ance of some condition precedent: DeColyar on Guarantees, Bl. ed., pp. 185 *et seq.*

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The expression must, therefore, be taken as equivalent to a guarantee of payment by the debtor for the goods referred to. With this construction placed upon it, it comes precisely within Lord Hatherley's second example: "I will be liable for the amount which A. B. shall owe you, subject to this limitation, that I shall not be called on to pay more than £250."

I think this guarantee is clearly distinguishable from those in question in the cases which have been referred to, having in view always the principle which is to govern. In all of them is to be noted the absence of any undertaking for the whole of an unlimited debt, with a restriction of the liability to a limited amount, and the absence of that undertaking is their key-note. It will be found, I think, that *Ex p. Rushforth*, 10 Ves. 409; *Paley v. Field*, 12 Ves. 435; *Bardwell v. Lydall*, 7 Bing. 489; *Thornton v. McKewan*, 1 H. & M. 525; *Gee v. Pack*, 33 L. J. Q. B. 49; *Ruikes v. Todd*, 8 A. & E. 846, are all decided upon the ground that the surety in each of those cases had stipulated that he should *not* be liable for the excess advanced beyond a named amount; and that he was therefore to be taken as being liable for the particular part of the advance made which did not exceed that amount. In *Hobson v. Bass*, L. R. 6 Ch. 792, Lord Hatherley decided in favor of the surety practically upon the same ground; he thought that the words "at any time" in the guarantee shewed an intention that the amount advanced should always be limited by the amount guaranteed.

In *Ex p. Holmes*, Mont. & Ch. 301, and *Gray v. Seckham*, L. R. 7 Ch. 680, there was no pretence for saying that the sureties had guaranteed anything beyond the amount of the notes or bills which they gave the debtor for his accommodation.

The principle being well established that a surety who is liable for a whole debt, but limits his liability to a fixed

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sum which is less than the sum due the creditor at the time the surety pays him, is not entitled to rank, and the guarantee here coming in its terms, as I think, plainly within the principle, in the absence of any authority justifying me in deciding otherwise, I feel bound to hold that the rights of the surety are governed by the principle.

The motion, in my opinion, should be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

MECHIAM V. HORNE.

Canada Temperance Act—Incorporation into, of secs. 62, 64, 66, 67 of R. S. C. ch. 178—Distress, dispensing with—Imprisonment for costs of commitment and conveying to gaol—Warrant of commitment—Excess of jurisdiction—Police magistrate—Summary conviction drawn up after Act ceased to be in force—Nullity—Conviction not quashed—Evidence of sufficient distress—Non-suit.

The defendant was the salaried police magistrate for the county of Ontario, in which the Canada Temperance Act was in force prior to the 11th May, 1889, when the order-in-council declaring it in force was revoked. On the 11th January, 1889, the plaintiff was convicted before the defendant of a second offence against the Act, and adjudged to pay a fine of \$100 and \$12 05 costs.

On the 20th March, 1889, the defendant issued a warrant of commitment reciting the plaintiff's conviction before him and the imposition of the fine and costs; declaring that the plaintiff had no goods and chattels; and directing her committal to gaol for sixty days "unless the said several sums and all the costs and charges of the said distress and of the commitment and conveying of the said Nellie Mechiam to the said common gaol, amounting to the further sum of 75 cents and shall be sooner paid unto you."

At the trial of an action for the arrest and imprisonment of the plaintiff under this commitment a conviction of the plaintiff was put in dated 11th January, 1889, but which was not drawn up till February, 1890. The conviction adjudged that the plaintiff should pay the penalty and costs according to the adjudication, and if these sums were not paid forthwith, then, inasmuch as it had been made to appear that the plaintiff had no goods or chattels whereon to levy by distress, that she should be imprisoned for sixty days unless these sums and the costs and charges of conveying to gaol should be sooner paid.

The conviction had not been quashed.

It appeared by the examination of the defendant that the 75 cents in the warrant was charged for the warrant, and that the blank was left for the constable to fill in the costs of conveying to gaol. The constable, however, did not fill in the costs, but indorsed a memorandum of them on the back of the warrant, making them \$13.40:—

Held, that the result of secs. 62, 64, 66, and 67 of R. S. C. ch. 178, which are incorporated into the Canada Temperance Act, R. S. C. ch. 106, by virtue of sec. 107, is to enable the convicting Magistrate to order the levy by distress of the penalty and costs, to dispense with such levy where he thinks it would be useless or ruinous, and to order the defendant to be imprisoned for a term not exceeding three months unless the penalty and costs, and also the costs and charges of the commitment and conveying to gaol, are sooner paid.

Regina v. Doyle, 12 O. R. 347, followed.

2. That, although the warrant of commitment went beyond the conviction by directing a detention for the costs of the commitment, as well as of conveying to gaol, yet as the only sum for which the gaoler could lawfully have detained the plaintiff was the sum of 75 cents mentioned in the warrant, and the costs of conveying to gaol greatly exceeded that sum, there was no excess in the warrant.

3. That, as the only evidence given at the trial with regard to the defendant's appointment as police magistrate was quite consistent with his

being in office at a salary under an appointment which did not expire with the Canada Temperance Act, it could not be said that the conviction drawn up in February, 1890, was a nullity.

4. That if the plaintiff was detained on account of the charges of the constable indorsed on the warrant, it was not the act of the defendant, for he never gave any authority to the constable to require the gaoler to detain the plaintiff for any sum not inserted in the warrant.
5. That as the conviction stated that it had been made to appear to the magistrate that there was no sufficient distress, and the conviction had not been quashed, evidence would not have been admissible to shew that there was sufficient distress.
6. That the commitment having been authorized by a lawful conviction, which had not been quashed, the plaintiff was properly non-suited.
7. That at all events the defendant was entitled to the protection of R. S. O. ch. 73.

Statement.

THIS action was brought by Eliza Nellie Mechiam, an infant, by Elizabeth Mechiam, her next friend, against George Horne, who was formerly police magistrate for the county of Ontario, to recover damages for her arrest and imprisonment under a commitment issued by him on 20th March, 1889; under which, on 28th March, 1889, she was committed to gaol, where she remained for some three weeks. The defendant pleaded not guilty by statute R. S. O. 1887 ch. 73, sub-sec. 1 of sec. 1, and sec. 4, and sub-secs. 1 and 2 of sec. 8, and secs. 13 and 21; also R. S. C. ch. 106, secs. 100 and 107; also R. S. C. ch. 178, secs. 3 and 64.

The action came on for trial before ARMOUR, C.J., at Whitby, on 12th March, 1890.

The plaintiff proved by the county gaoler that she was kept imprisoned from 28th March, 1889, until 17th April, 1889, under a commitment signed by the defendant as police magistrate, reciting her conviction before him on 11th January, 1889, of having, between 27th November, 1888, and 27th December, 1888, unlawfully sold intoxicating liquor contrary to the Canada Temperance Act, after a previous conviction under that Act of a similar offence; reciting also the imposition of a fine of \$100, with \$12.05 costs; that the plaintiff had [no goods or chattels; and directing her committal to goal for sixty days, "unless the said several sums, and all the costs and charges of the said distress, and of the commitment and conveying of the said

Nellie Mechiam to the said common gaol, amounting to ^{Statement.} the further sum of seventy-five cents, and shall be sooner paid unto you."

The plaintiff's counsel then put in a portion of the defendant's examination for discovery, in which, after producing the notice of action served on him, he said: "I was a salaried magistrate. My appointment was subsequent to the passing of the Act enabling a salary to be paid to a county police magistrate. I was a salaried police magistrate at the time this conviction was made. I think my commission covers the whole county of Ontario. The blank after the words "seventy-five cents" in the warrant was for the costs of the constable. I cannot say what that seventy-five cents would be for. As far as I can recollect, it would be for the warrant of commitment. Whatever costs the constable incurred in executing the commitment were, as far as I recollect, to be added to it. Any warrant I drew up I left to be filled by the constable as to his additional expenses. Only the costs of executing the warrant were left to be filled up by the constable. The costs which were made up to the time of the warrant leaving my hands were put in by myself. The way I construe the section as to filling the warrant is that I don't know what the amount of the subsequent costs of executing the warrant would be. After the warrant leaves my hands, I have no check as to the amount of the constable's costs that may be filled in the warrant. Although the conviction adjudges the fine and costs to be paid forthwith, I consider the enforcing it at this time was the proper thing to do. I did not state to the plaintiff, or to anyone on her behalf, that if the refund of this money was insisted on, that I would and could enforce another thirty days' term against her. I presume the paper produced marked No. 3 is a copy of the conviction which was made. The conviction was drawn up some time in February last; I presume a few days before the filing. I could not say when I put in the words in black ink at the foot of the memorandum of evidence produced marked 4.

Statement. They were either the same evening or shortly afterwards. It was not done while I was adjudicating upon the matter. The memorandum in black ink was not made at the hearing. There was no distress warrant issued. I did hand a warrant to enforce this conviction to constable McBean. My instructions to the constable were that if he had any further charges he was to add them to the warrant. The plaintiff was to be detained until these further charges should be paid. The warrant says this. The blank was left there in this printed form so that these further charges might be filled in. I presume that was what it was left for. I don't know what else it was left there for. These charges would have to be represented to the gaoler in some way so that he would know what they were. These further costs of the constable were part of the burden put upon the plaintiff before she could be released, as shewn by the warrant. There was no application made by any one to me for the issue of the distress warrant. I knew the plaintiff lived at Gamebridge."

After putting in these portions of the examination, the conviction, and the original memorandum of the evidence taken before the defendant, the plaintiff's counsel closed his case. The adjudication at the foot of the memorandum of the evidence taken before the defendant was put in with the evidence and was as follows: "I therefore adjudge that the defendant Nellie Mechiam, for her said second offence, be fined the sum of \$100 and costs, \$12.05, to be paid forthwith; if not so paid to be levied by distress and sale of the goods and chattels; if not sufficient distress to be committed to the common gaol of the county at Whitby for the space of sixty days. Signed, GEORGE HORNE, P.M.

After this, in a different ink, was written: "Whereas it appears to me that the said Nellie Mechiam has no goods or chattels, &c."

Upon the back of the commitment appeared in pencil the following memorandum, in the handwriting, apparently, of the constable who signed it.

Fine.....	\$100 00	Statement.
Costs	12 05	
Warrant	75	
Mileage to execute.....	3 00	
Executing	1 50	
Railway fare	1 90	
Mileage to Whitby.....	6 50	
Meals by the way	50	
Amount to be paid.....	\$126 20	

Signed, "L. McBAIN."

The conviction put in, after adjudging that the said Nellie Mechiam should pay the penalty and costs, proceeded "and if the said several sums be not paid forthwith, then, inasmuch as it has now been made to appear to me that the said Nellie Mechiam has no goods or chattels whereon to levy the said several sums by distress, I adjudge the said Nellie Mechiam to be imprisoned in the common gaol for the county, at Whitby, in the said county of Ontario, and there to be kept for the space of sixty days, unless the said sums and the costs and charges of conveying the said Nellie Mechiam to the said common gaol shall be sooner paid."

Upon the defendant's counsel objecting that the plaintiff could not proceed without shewing that the conviction had been quashed, the learned Chief Justice gave effect to the objection and non-suited the plaintiff.

At the Easter Sittings of the Divisional Court, 1890, the plaintiff moved upon notice to set aside the non-suit and for a new trial, upon the following grounds:

1. That the learned Chief Justice at the trial erred in holding that the conviction must be quashed before action brought, it having been drawn up and sealed after the defendant had ceased to hold the office of police magistrate.

2. That even if defendant could legally draw up his formal conviction after ceasing to hold office, it could only

Statement.

be so drawn up as to conform with and be confirmatory of the actual adjudication, which directs a levy by distress.

3. That the conviction did not require to be quashed before action brought, as it did not authorize the grievance complained of.

4. That the act of imprisoning the plaintiff until the costs of commitment and conveying to gaol, as well as the fine and costs, should be paid, was a trespass for which the defendant was liable.

5. That it was not shewn in evidence that or how it appeared that there were no goods and chattels of the plaintiff upon which to distrain.

6. That the fee of seventy-five cents is wholly unauthorized.

7. That such fee, even if authorized, is admittedly a charge incident to the commitment, and not to the conveying to gaol of the plaintiff.

8. That even if the term and conditions of the contingent punishment do not require to be awarded in the conviction, there was no authority to adjudge the detention of the plaintiff until the costs of commitment and conveying to gaol were paid, there being no time or manner of imprisonment directed by the special Act upon which the conviction herein is founded.

9. That the act of the constable in adding his charges to the commitment was shewn by the evidence to have been authorized and sanctioned by the defendant.

The motion came on for argument on 26th May, 1890, before the Divisional Court (FALCONBRIDGE and STREET, JJ.)

Du Vernet, for the plaintiff. The onus was on the defendant to produce a valid conviction authorizing the commitment, and the plaintiff was wrongfully compelled at the trial to produce the conviction: *McLellan v. McKinnon*, 1 O. R. at p. 227. R. S. O. ch. 72, sec. 10, provides that a police magistrate appointed for a county in

which the Canada Temperance Act is in force shall cease Argument.
to be such police magistrate from the time that the Act ceases to be in force. R. S. C. ch. 178, sec. 53, provides that if the justice convicts, he is to make a minute, and the conviction shall afterwards be drawn up by the justice. In this case this was not observed. When the defendant drew up this conviction he had ceased to be a magistrate, and it was no conviction. The defendant has not, therefore, the protection of a conviction for his acts, and the learned Chief Justice was wrong in ruling that the plaintiff could not succeed while the conviction remained unquashed. I refer to *Bond v. Conmee*, 16 A. R. 398; *Brydgett v. Coyney*, 1 Man. & Ry. 211. Where the warrant of commitment goes further than the conviction, it is not necessary to have the conviction quashed. I refer to *Regina v. Ferris*, 18 O. R. 476; *Regina v. Rowlin*, 19 O. R. 199; *Jones v. Grace*, 17 O. R. at p. 688; *Arscott v. Lilley*, 14 A. R. 283; *Sinden v. Brown*, 17 A. R. 173; *Campbell v. Flewelling*, 15 New Brunswick 403.

Farewell, Q.C., for the defendant. The conviction may be drawn up at any time: *Rex v. Picton*, 2 East 195; Burn's Justice, 30th ed., vol. 1, p. 1162. There is no evidence that the defendant had ceased to be a magistrate when he drew up the conviction. The defendant had two commissions, and he did not cease to be a magistrate when the Canada Temperance Act ceased to be in force. It makes no difference that the warrant was issued before the conviction was drawn up: *Rex v. Barker*, 1 East 186; Paley on Convictions, 6th ed., 303, 304; *Ex p. Johnson*, 3 B. & S. 947. The warrant of commitment operates as a conviction: *Massey v. Johnson*, 12 East 67; *Charter v. Greame*, 13 Q. B. 216. A case upon the duties of a sheriff, applying to this by analogy, is *Jones v. Cowden*, 34 U. C. R. 345. The adjudication may be amended: *Regina v. Brady*, 12 O. R. 358. An irregular form of commitment is not to be construed to be an excess of jurisdiction so as to deprive a magistrate of the protection of a statute:

Argument. *Dickson v. Crabb*, 24 U. C. R. 494; *Moffat v. Barnard*, *ib*] 498; *Bott v. Ackroyd*, 28 L. J. M. C. 207.

Du Vernet, in reply.

After the argument, the two commissions of the defendant as police magistrate were put in, and a further argument was also allowed to be put in, in writing.

Du Vernet. The magistrate had no power to draw up, sign, and seal the conviction after the repeal of the Act authorizing it: *Surtees v. Ellison*, 9 B. & C. 750; *Jones v. Ketchum*, 11 U. C. R. 52; *Simpson v. Ready*, 11 M. & W. 344; *Kay v. Goodwin*, 6 Bing. 576; *Steavenson v. Oliver*, 8 M. & W. at p. 241; *Bryant v. Hill*, 23 U. C. R. 96; *McDougall v. McMillan*, 25 C. P. 75; *McDonald v. McDonell*, 24 U. C. R. 424; *Cotter v. Sutherland*, 18 C. P. 357; *Charlesworth v. Ward*, 31 U. C. R. 94; *Regina v. Denton*, 21 L. J. N. S. M. C. 207; *Dears*, C. C. 3; *Morgan v. Thorne*, 7 M. & W. 400. By the granting of a second commission to the defendant the first became annulled, as it was inconsistent therewith, or it became merged in the second. The first commission, dated 29th March, 1887, covers the whole county of Ontario, including the town of Uxbridge, thereby, by implication, excluding the towns of Oshawa and Whitby. By this commission the defendant was appointed police magistrate without salary, and became entitled to the ordinary fees of a justice of the peace under R. S. O. ch. 72, sec. 25. The second commission, dated 1st June, 1887, was for the whole county. By this he was appointed a salaried magistrate, and could no longer act under his first commission and take the usual fees for justices of the peace: *Town of Peterborough v. Hatton*, 30 C. P. 455. Thus his first commission was revoked, inasmuch as he could no longer act upon it, and it can hardly be maintained that the repeal of the Canada Temperance Act revived a commission which had been thus annulled. On this point I cite *Worth v. Newton*, 10 Ex. at p. 255. As to affixing signature and seal at proper time, I refer to *Re Mottashed and Corporation of Prince Edward*, 30

U. C. R. 74. As to the powers having to be strictly gathered from the commission itself, I refer to *Hammond v. McLay*, 28 U. C. R. at p. 472, and cases there cited.

Farewell, Q. C. As to the effect of the repeal of the Act, I refer to R. S. C. ch. 1, secs. 49, 53; 50 Vic. ch. 2, sec. 8 (O). The cases cited by Mr. Du Vernet upon this branch of the case are distinguishable because they refer to acts still necessary to be done, and not to such acts as had been "commenced, prosecuted, and concluded." On this head I refer to *Doe Tiffany v. Miller*, 10 U. C. R. 65; *Jones v. Cowden*, 34 U. C. R., at p. 358; *Restall v. London and South-Western R. W. Co.*, 18 L. T. N. S. 331. As to the argument that the second commission acted as a revocation of the first. Both commissions cover the whole county of Ontario. As there was at the time no police magistrate in the town of Uxbridge, and never has been, the words "including the town of Uxbridge" were probably inserted in the first commission to make it clear that that town was included within the jurisdiction. The defendant, as county police magistrate under the second commission, is not prevented from taking the usual fees of justices of the peace, for sec. 25 of R. S. O. ch. 72 expressly provides that he shall be entitled to receive the same fees and emoluments as are paid to justices of the peace, the only difference in this respect being that the fees received by him shall be paid to the municipality. Besides, it is submitted that the provisions contained in this section of the Revised Statutes do not apply to the defendant, who was appointed police magistrate before the revision of the statutes of 1887. *Town of Peterborough v. Hatton*, 30 C. P. 455, was decided upon an appointment under the Revised Statutes of 1877, while the defendant was appointed under 50 Vic. ch. 11. As the new commission covered the same territory and gave the same powers to the defendant as the first one, with the addition of a salary for his services, there is no incompatibility of offices. *Worth v. Newton*, 10 Ex. at p. 255, cited for the plaintiff, does not apply, for the offices are the same, the salary

Argument. being included in the latter commission for the benefit of the defendant. There is no evidence that the defendant resigned or surrendered his first commission, which from the dictum of Parke, B., in the above case would seem to be necessary before amotion or surrender could be implied. The proposition to offer evidence on a new trial that there was a police magistrate for the town of Oshawa, is one which, it is submitted, should meet with no greater favour or success than was awarded to a similar objection in *Regina v. Atkinson*, 15 O. R. 110.

Any construction of the commission which prevents the justice from doing all that he ought to be empowered to do to complete the proceedings lawfully taken before the repeal of the Act, is not one favourable to the Crown, but the reverse. The vote of the electors upon the Canada Temperance Act is in the nature of a repeal of a county by-law. Repeals cannot be made to operate retrospectively to the prejudice of vested rights: *Rex v. Ashwell*, 12 East 22; *State v. Pinto*, 7 Ohio St. 355; *Pond v. Negus*, 3 Mass. 230.

November 17, 1890. The judgment of the Court was delivered by

STREET, J. :—

The plaintiff's complaints against the defendant are as follows :

1. That the statutes under which he purported to act did not authorize him to commit her to gaol for the costs of the commitment and conveying her thither, in addition to the penalty and costs adjudged.

2. That if they did authorize him to do so, the conviction does not adjudge that she should be detained for the costs of the commitment in addition to the costs of conveying her to gaol, and that to that extent the warrant of commitment is unauthorized.

3. That it was unnecessary that the conviction should be quashed, and that it formed no protection to the defendant, because the commitment went beyond it, and the injury complained of was, therefore, not justified by the conviction; and because also the conviction was drawn up after the happening of certain facts which had the effect (as is contended) of terminating the defendant's commission as police magistrate.

Judgment.
Street, J.

4. That the plaintiff was detained by the defendant's authority for certain charges indorsed on the warrant of commitment by the constable.

5. That the special Act (the Canada Temperance Act) does not authorize the imprisonment of a defendant for default of payment of the costs of commitment and conveying to gaol for any time or in any manner.

6. That it was not shewn in evidence that there was no sufficient distress out of which the penalty and costs might have been levied.

Some of these objections are not covered by authority, but several of them are.

In *Regina v. Doyle*, 12 O. R. 347, it was decided by Wilson, C. J., that the effect of sec. 107 of the Canada Temperance Act, ch. 106, R. S. C., was to incorporate into it the present secs. 62 and 66 of ch. 178, R. S. C.: the present secs. 64 and 67 of ch. 178 must also be treated as incorporated into it. The result of these three sections is to enable the magistrate to order the levy by distress of the penalty and costs, to dispense with such levy where he thinks it would be useless or ruinous, and to order the defendant to be imprisoned for a term not exceeding three months unless the penalty and costs, and also the costs and charges of the commitment and conveying the defendant to prison, are sooner paid. This disposes of objections 1 and 5.

With regard to the second objection: it is true that the commitment does not in words follow the conviction, and that it appears in its terms to go beyond it by directing a detention for the costs and charges of the commitment, as well as of the conveying to gaol of the prisoner. But this objection

Judgment.
Street, J.

in the present instance is purely technical, and we should not give effect to it unless compelled to do so. The conviction does properly authorize the detention of the prisoner for the expense of conveying her to gaol. These costs apart from any costs of the commitment, appear from the indorsement made by the constable on the warrant to have amounted to some \$12 or \$13, and it is plain that they must have considerably exceeded the sum of seventy-five cents, which is the amount mentioned in the warrant of commitment as chargeable against the prisoner in respect of them, and therefore the only sum for which the gaoler could lawfully have detained her. See sec. 98, ch. 178, R. S. C.

Even, therefore, if compelled to read the words "costs and charges of the commitment and conveying of the said Nellie Mechiam to gaol" in the commitment as meaning more than the words "costs and charges of conveying the said Nellie Mechiam to gaol," as I think we are, we may still give the magistrate the benefit of the fact that he has fixed these costs and charges at a sum very much less than that at which they might properly have been fixed had there been no reference whatever to the costs of the commitment, and the prisoner was never committed by the defendant for an amount greater than that authorized by the conviction, and there was, therefore, no excess in the commitment.

The commitment for the amount named in it having then been authorized by a lawful conviction, the non-suit was right, unless the formal conviction put in by the plaintiff was a nullity. It is, on its face, in due form, and it is under the hand and seal of the defendant, as police magistrate. The plaintiff's counsel, however, contends that it is a nullity because the evidence shews that it was not actually drawn up until February, 1890, at which time he alleges it must be taken from the evidence that the defendant's appointment as police magistrate had terminated by the repeal of the Canada Temperance Act in the county for which he was appointed.

It is true that amongst the notes of Orders-in-Council, at p. 124 of the Dominion Statutes of 1889, appears a memorandum that by Order-in-Council dated 11th May, 1889, the Order-in-Council declaring the Canada Temperance Act in force in the county of Ontario was revoked, and a reference to the *Canada Gazette*, in which the Order-in-Council is probably set out, a fact which was not called to the attention of the learned Chief Justice at the trial. But no proof was given at the trial upon which it would have been possible to hold that the defendant's tenure of his office of police magistrate was only under 50 Vic. ch. 11, and terminated therefore with the life of the Canada Temperance Act in the county of Ontario. The only evidence bearing upon the point is to be found in defendant's deposition, in which he says that he was a salaried police magistrate at the time this conviction was made, and that his appointment was subsequent to the passing of the Act enabling a salary to be paid to a police magistrate. This is quite consistent with his being in office at a salary under an appointment which did not expire with the Canada Temperance Act.

Since the argument the plaintiff's counsel has furnished us with copies of two commissions to the defendant as police magistrate, one of which is under 50 Vic. ch. 11, and probably terminates with the Scott Act, while the other does not. We do not think, however, that the case is one which we should now re-open to let in further evidence which might have been produced at the trial. It is unnecessary to consider whether in any event the plaintiff was not bound to raise this question by a motion to quash the conviction, instead of at the trial of the action, where he could only succeed upon the assumption that it was a nullity. This disposes of the third objection.

The 4th objection is that the plaintiff was detained in gaol by the defendant's authority for certain charges indorsed on the warrant of commitment by the constable. This objection is not supported by the evidence: the defendant intended that the constable should insert in the warrant

Judgment.**Street, J.**

certain charges; the constable did not do so, but put a pencil memorandum of them upon the back of the warrant. The defendant never gave any authority to the constable to require the gaoler to detain the plaintiff for any sum not inserted in the warrant, and therefore any detention on that account was the act of the constable or gaoler, not of the defendant.

The sixth and last objection is that it was not shewn that there was no sufficient distress out of which the penalty and costs might have been levied.

The conviction contains a statement that it has been made to appear to the magistrate that there was no sufficient distress; the conviction has not been quashed; and no evidence was offered to shew that there was sufficient distress. If offered, I think such evidence would, under the circumstances, have been properly rejected.

The nonsuit appears upon all these grounds to have been right upon the objection taken. Even, however, if that objection had failed, it seems clear that the defendant must be held to be within the protection of ch. 73 of the R. S. O. He appears from the evidence to have been acting in good faith in the capacity of police magistrate, believing that he had the right to do so, and there is nothing to shew that he acted so as to disentitle himself to the protection of the Act. The plaintiff must, upon this ground, have been nonsuited, because, amongst other reasons, the action was not begun until after the expiration of six months from the injuries complained of: *Sinden v. Brown*, 17 A. R. at pp. 187-8.

The motion should, in my judgment, be dismissed with costs.

[CHANCERY DIVISION.]

BUNNELL V. GORDON ET AL.

Declaratory judgment—Inchoate right to dower—Incidental to present relief
—R. S. O. 1887, ch. 44, sec. 52, sub-sec. 5.

Where the sole object of an action was to obtain a declaration that the plaintiff was entitled to an inchoate right of dower in certain lands, all other questions raised in the pleadings having been settled by agreement before trial :—

Held, that, notwithstanding R. S. O. 1887, ch. 44, sec. 52, sub-sec. 5, no such declaration should be made, for it would be solely as to a claim which might or might not be made, under circumstances which might or might not happen, and was not required in anyway as incidental to any present relief whatever. R. S. O. 1887, ch. 44, sec. 52, sub-sec. 5, was not intended to make any radical change in the rules and practice of the Court.

THIS was an action brought for the purpose of obtaining ^{Statement} the declaration of the Court that the plaintiff was entitled to an inchoate right of dower in certain lands.

The action came on for trial on October 20th, 1890, at Ottawa, before FERGUSON, J.

The facts are sufficiently stated in the judgment.

O'Gara, Q. C., for the plaintiff.

Snow, for the defendant Gordon.

G. F. Henderson, for the other defendants, mortgagees of the property in question.

The following authorities were cited on the argument: *Holmsted* and *Langton's* Judicature Act and Rules, p. 39; *Lady Langdale v. Briggs*, 8 D. M. & G. 391; *Dowling v. Dowling*, L. R. 1 Ch. 612.

November 28th, 1890. FERGUSON, J.

Before the trial an agreement had been entered into by the plaintiff and the defendant Gordon, as the assignee, under the statute, of the plaintiff's husband, by which

Judgment. they agreed to settle on the terms set forth in the document—the agreement—all the causes of action referred to in the statement of claim, “with the exception of such parts thereof as seek to have it declared that the plaintiff is entitled to an inchoate right to dower in the lands described in the plaintiff’s statement of claim.” This exception does not seem to be grammatically drawn, but the plain meaning is that only the one matter or question remained, after the agreement, for determination by the Court, so far as these parties were concerned.

Ferguson, J.

In another part of the agreement is this passage: “It being understood that the only question to be tried between the parties, shall be whether or not the plaintiff is entitled to an inchoate right to dower in the lands referred to in the plaintiff’s statement of claim.”

The defendants, the mortgagees upon the land, are not parties to this agreement. Their claim is prior to the assignment, and is upon these lands only. They do not consider that their rights are affected by the agreement, and they only ask that their costs shall be added to their mortgage debt.

It was also stated and agreed at the bar that the only question to be tried and determined was, whether or not the plaintiff is entitled to a declaration of her alleged right, that she is entitled to an inchoate right of dower in the lands.

The plaintiff was married in the year 1872. It appears that there was no marriage contract or settlement. The plaintiff’s husband acquired the property in 1886. The plaintiff executed the mortgage at his request. She got no consideration for so doing. The husband is still living. The mortgage was to secure the sum of \$5,000, part of the purchase money, which was \$6,000. On this mortgage \$1,500 has been paid, leaving a balance of purchase money \$3,500, secured by the mortgage. The assignment to the defendant Gordon was made in February last. He says he tried to sell the property; that he advertised it for sale; that there were purchasers (by which I think he means

bidders) at the place for the sale; and that the highest price offered was \$6,200. The property was not sold. The conditions of sale were produced. These say that the sale was to be subject to the mortgage and to the inchoate right of dower, if any. The latter is in pencil on the margin, and was, I think, put there at the time and place of the intended sale, for the solicitor for Gordon says that before Mr. Wyld (the solicitor for the plaintiff) came to the place of sale, the intention was to sell the property regardless of the plaintiff's alleged right of dower; and he says the contention "all along" had been that she had no such right. I think it appears that there was the intention on the part of the defendant Gordon to sell regardless of any right of dower inchoate or otherwise that the plaintiff might claim or have, and although the conditions of sale were changed on the one occasion as above mentioned, it is still contended that the plaintiff has not the right in respect of dower that she claims and contends for. These are no doubt the reasons in fact why the present action was brought.

Judgment.
Ferguson, J.

One does not, however, see how any sale that might be made by the defendant Gordon, could defeat any right the plaintiff may have in respect of dower. Plaintiff's counsel, in answer to a question by me on this subject, urged that there would be danger of an estoppel being set up against the plaintiff hereafter; but surely the plaintiff need not allow herself to be estopped by conduct. She need never stand by and remain silent when she should speak.

In this respect she has only to conduct herself as ordinary owners of property are obliged to do. This is, of course, assuming that she is entitled as she contends she is.

The authorities on the subject of merely declaratory judgments, are collected in Messrs. Holmsted and Langton's work upon the Judicature Act, &c., at p. 39. The case *Austen v. Collins*, 54 L. T. N. S. 903, was decided under Order 25, Rule 5, which is the same as our present

Judgment. enactment. There the learned Judge said: "The rule
Ferguson, J. leaves it to the discretion of the Court to pronounce a declaratory judgment when necessary, and it is a power which must be exercised with great care and jealousy."

In some cases a decree has been made declaring future rights, as the right of renewal on which a lessee's claim for compensation for land taken by a railway company (in part) depended: *Bogg v. Midland, R. W. Co.*, L. R. 4 Eq. 310. This, however, seems to have been necessary in order to the proper determination of other present rights.

On the authority of cases such as *Lady Langdale v. Briggs*, 8 D. M. & G. 391, showing or going to show that the Court will not make declarations of future rights in events that have not happened, it was argued that there could not or should not be any declaration respecting the rights contended for by the plaintiff here, the right, assuming it to exist, being a future right dependent upon the death of the plaintiff's husband during her life time.

I do not take the view that the right, assuming it to exist, is to be considered entirely as a future right. It can, I think, in a sense, be recognized as a present right, though depending upon this contingency.

In this particular respect to me it resembles a contingent remainder or interest in land, which is frequently a property of large present value and so considered. It is, I think, in a sense, a present right to a contingent future interest in land. It is probably not what is called an estate in lands, and no doubt differs in many respects from many other contingent interests in land; but in regard to its being or not being a present right, it is, I think, as I have said.

The former Chancery Order 538, was: "No suit is to be open to objection on the ground that a merely declaratory decree or order is sought thereby, and the Court may make a binding declaration of right without granting consequential relief." The cases, or some of them, decided under law similar to this, show, I think, that such a declara-

tion would not be made except where necessary for the Judgment administration of an estate, or in order to grant relief; Ferguson, J. and that a plaintiff could not have a prospective declaration guarding against a claim which might never be made. The decisions seem to show that the order or law similar to it, did not apply unless the plaintiff would be entitled to consequential relief if he chose to ask it. In *Jackson v. Turnley*, 1 Drew. 617, it was held that the meaning of 15 & 16 Vict. ch. 86, sec. 50, was only to remove the objection that a plaintiff who might have consequential relief, prays merely for a declaration of right; and that it did not mean to entitle a person to have a declaration as to a claim which might be made by another under circumstances which might or might not happen.

The enactment in force at present, 48 Vict. ch. 13, sec. 5, (R. S. O. 1887, ch. 44, sec. 52, sub-sec. 5), was no doubt intended as an amendment of the law as expressed in Order 538, above referred to. It is, "No action or proceeding shall be open to objection on the ground that merely a declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not." The difference between the law as it was formerly, and the present law on this immediate subject seems to be that the latter *enables* the Court to make a binding declaration of right whether any consequential relief is or could be claimed or not, whereas the former only *enabled* the Court to make such a declaration when consequential relief was claimed or might have been claimed. A plaintiff was and is given the right not to have his suit or action objected to on the ground that only a declaratory judgment, decree, or order is sought, and then the Court is empowered to make binding declarations of right as above stated; but the power is, I think, to be exercised only when it appears to be necessary so to do.

In the present case there is no pretence that the plaintiff could have claimed any consequential relief, and although the view of the character or kind of the claim,

Judgment. assuming it to exist, as stated above, is that it is in a sense
Ferguson, J. a present interest, yet it no doubt depends upon a future contingency ; and the interest, considered as an interest in the land, is certainly a future and contingent interest, that is, if it exists.

In the case *Kevan v. Crawford*, 6 Ch. D. at p. 42, in appeal, Sir Geo. Jessel said : " The objection to the declaration is this, that it is a declaration as to future rights, future contingencies and remote interests. * * The rule of the Court of Chancery always was not to entertain a suit merely for that purpose. There are some instances in which as incidental to relief given, it has become absolutely necessary to determine such rights, and in that way those rights are and must be determined, but no suit is entertained simply and exclusively for the purpose of deciding upon the nature and extent of future contingent rights without immediate present relief ;" and in this the other learned Judges fully agreed.

As it seems to me the additional power given to the Court by the enactment in question, was not intended to make any radical change in the rules and practice of the Court, but only to empower the Court when the Court can see that the case is a proper one in which so to do, to make the declaration, even though consequential relief could not have been claimed.

If the plaintiff has the right which she contends she has, it is, as I have said before, a right which cannot be taken from her by any sale or conveyance by the defendant Gordon, or by any one to whom he may convey. Cases in which the value of an inchoate right of dower is ascertained and paid, are provided for by statute law. As disclosed at the trial, the mortgagees have brought an action of foreclosure, and have made this plaintiff a party defendant therein, so that so far as the mortgage has concern, any right she may have can be fully protected in that action. It turned up, however, that this action was commenced a few days before that action. Then what is asked is, at all events, in a measure, a declaration as to a

claim which may be made by another or others under Judgment. circumstances that may or may not happen, and so against Ferguson, J. the principle stated in *Jackson v. Turnley*.

The mortgage action is pending, as I have stated. The matters of this action, excepting this one thing, have been settled, as I have also said. The defendant Gordon as assignee in trust, has the equity of redemption that was owned by the plaintiff's husband. He cannot, by selling it for the benefit of creditors or otherwise, deprive the plaintiff of any right in respect of dower that she may have. It may well be that any *terre tenant* against whom dower out of this land may be claimed, should have the right to have an action for such dower tried in the ordinary and prescribed way, instead of having the right determined finally by any declaration made here, and I fail to see upon what principle, or according to what theory or policy I am called upon to make the declaratory order asked for, even assuming that I should be of the opinion that the plaintiff has the right. I do not think I am bound so to do, and I think my duty is to refuse to make any declaration on the subject. The refusal will, however, be without costs under the circumstances, which, I think, justify withholding costs, except costs of the mortgagees defendants who will have their costs added to their mortgage debt as asked by their counsel.

Order accordingly without costs.

A. H. F. L.

[CHANCERY DIVISION.]

McCORMICK ET AL. V. MUNICIPAL CORPORATION OF THE
TOWNSHIP OF PELÉE.

Municipal Corporations—Way—Road washed away by water of lake—Duty to repair—Difference between reparation and restoration.

Where in an action brought to compel a municipal corporation to repair a portion of a road which ran along the shore of a lake, it appeared that the road had been completely submerged by the water, so that restoration would be necessary, and no ordinary reparation could suffice :—

Held, that the defendants were not obliged by law to do the work.

Statement

THIS was an action brought by Arthur McCormick and Henry Rehburg, residents of the township of Pelée, against the municipal corporation of the township, in which the plaintiffs alleged, in their statement of claim, that for about fifty years prior to 1883, a public road or highway ran along the west shore of Pelée Island, which formed the township, and in front of their lands: that about 1883, the defendants assumed to close up the said road, in front of the plaintiffs, without compensation to the latter or providing any other convenient road: that the defendants had allowed the road to become out of repair, and portions of it to be washed by the waters of Lake Erie, and the plaintiffs were thus rendered unable to travel along the same, yet the defendants refused to repair or provide another convenient road or way for the plaintiffs, wherefore the plaintiffs claimed damages, a mandatory injunction compelling the defendants to re-open, and to repair and keep in repair the road in question, and further relief.

Among other defences, the defendants set up that the road in question was not a public highway, but a mere way of convenience along the beach of Lake Erie, and useable at certain seasons of the year only: that the beach or shore where the alleged highway existed, was and is low and sandy, and encroachments were from time to time made upon said highway by the action of the water which

eventually destroyed the said road and rendered it impassable; and the said road had not been restored, nor had it been practicable to restore it: that the restoration of the road, if at all practicable, would require the erection and maintenance of a substantial sea wall, at an expense far exceeding the resources of the defendants, and it would therefore be unreasonable to impose upon the defendants a liability to maintain the said way: that they had proposed to construct a convenient highway at some distance from the lake shore, through the lands of the plaintiffs and other property owners, but the plaintiffs and the other property owners made such strenuous opposition that the undertaking was abandoned, and the defendants then proceeded to purchase a strip of land from the plaintiffs and other property owners for the purpose of widening the said lake shore highway, and the delay in so widening it was due to the refusal of the plaintiff Rehburg to sell, except at a price so exorbitant that the defendants would not be justified in purchasing.

The facts of the case sufficiently appear from the judgment.

The action came on for trial before BOYD, C., at Sandwich on November 21st, 1890.

T. M. Morton, and *J. L. Murphy*, for the plaintiffs. The highway was a public highway, and has been destroyed by the action of the water of the lake at various points. There is no other way of protecting that bank of the island except by keeping up the road as a safeguard. It is for the public interest of the whole island that this shore should be protected. I refer to *Hislop v. Township of McGillivray*, 15 A. R. at p. 692; *Hubert v. Township of Yarmouth*, 18 O. R. 458.

M. A. McHugh, for the defendant. Here the roadway has been destroyed: *Regina v. Bamber*, 5 Q. B. 279. There must be restoration and not merely repair: *Regina v. Inhabitants of Hornsea*, 1 Dear. C. C. 291.

Judgment. December 5th, 1890. BOYD, C.:—

Boyd, C.

Gradual accretions of land from water belong to the owner of the land gradually added to, and conversely land gradually encroached upon by water ceases to belong to the former owner : *Foster v. Wright*, 4 C. P. D. at p. 446.

The map in evidence in this case shews that the place occupied by the allowance for highway in 1866 is now under water ; it has become by degrees part of the navigable waters of Lake Erie, and as such the soil has vested in the Crown. Thus the highway by land has become literally merged in the highway by water. The necessities of the case, then (to give the relief asked) would be to require the municipality not merely to repair but to restore. That, they are not called upon to do by law. Any ordinary reparation at the point in question would be evidently ineffectual, even if the way were reinstated ; no road can be with reasonable outlay maintained along the lake-shore at this place without the erection of walls or embankments, or other expedients for resisting the encroachment of the lake. And this is not the work of municipalities under the general law now invoked.

The plaintiffs' case is beset with difficulties : the site of the road allowance being submerged there is nothing to put or keep in repair ; to get a highway along the shore it would be 'needful to expropriate the property of the lake-frontagers, a proceeding which the plaintiffs' resist ; the plaintiffs as individuals shew no special injury to themselves apart from the rest of the community which would give right of action for damages and injunction.

I may refer to the following cases : *Rex v. Inhabitants of Landulph*, 1 M. & Rob. ib. 393 ; *Regina v. Paul*, 2 ib. 307 ; *Regina v. Bamber*, 5 Q. B. 279, and *Regina v. Inhabitants of Hornsea*, 1 Dears. C. C. 291 ; *Hislop v. Township of McGillivray*, 15 A. R. 637.

Pursuant to the admissions and submissions of the parties, the action is dismissed with costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

RE SIMS ET AL. V. KELLY.

Prohibition—Division Court—Erroneous interpretation of statute—Husband and wife—Magistrate's order for payment of maintenance money under 51 Vic. ch. 23, sec. 2, (O.)—Action to recover arrears.

Where new rights are given by a statute with specific remedies for their enforcement, the remedy is confined to those specifically given.

And where a wife obtained a magistrate's order under 51 Vic. ch. 23, sec. 2, (O.), for payment by her husband of a weekly sum for her support :—

Held, that her remedies were limited to those given by the statute, and that an action in the Division Court for arrears of payments under the order could not be maintained against the husband.

The facts not being in dispute, prohibition to the Division Court was granted on the ground that the Judge in that Court had given an erroneous interpretation to the Act referred to in holding that the magistrate's order was equivalent to the final judgment of a Court and that an action upon it would lie.

THIS was a motion by the defendant for a prohibition to *Statement.* the first Division Court of the county of Brant, to restrain further proceedings upon a judgment pronounced by the County Judge in a suit in that Court, in which Sims and Teeple, executors of Mrs. Kelly, were plaintiffs, and Kelly was defendant.

The papers filed upon the motion shewed that on the 16th January, 1890, the police magistrate of Brantford made an order under sec. 2 of ch. 23, 51 Vic., being the Ontario Statutes of 1888, entitled "The Married Women (Maintenance in case of Desertion) Act," 1888, upon the application of Caroline Kelly, that her husband, Robert S. Kelly, should pay her the weekly sum of \$3 for her support. Caroline Kelly died, and at the time of her death eighteen weekly payments of \$3 each remained unpaid, together with \$2.85 costs of the order. The plaintiffs proved her will, and brought an action in the first Division Court of Brant to recover the amount of these instalments and costs; it was objected on the part of the defendant that no action could be maintained upon the police magistrate's order.

The learned Judge reserved judgment, and decided in the plaintiff's favour upon the authority of *Williams v.*

Argument. *Jones*, 13 M. & W. 628 ; and the defendant now moved for prohibition.

The motion was argued before STREET, J., in Chambers on the 5th December, 1890.

Wilkes, Q.C., for the defendant.

W. D. Jones, for the plaintiffs.

Messenger v. Clarke, 5 Ex. 388, and *Re Eberts v. Brooke*, 11 P. R. 296, were referred to.

December 6, 1890. STREET, J.:—

The facts are not in dispute ; the question is one entirely of law, and I think upon the authority of *Re Long Point Co. v. Anderson*, 19 O. R. 487, that prohibition will lie in case the Judge of the Division Court has given an erroneous interpretation to the Act above referred to, in holding that the order of the police magistrate was equivalent to the final judgment of a Court, and that an action would lie upon it.

The case of *Williams v. Jones*, 13 M. & W. 628, upon which the learned Judge relies, was decided in 1845. In the later case of *Berkeley v. Elderkin*, 1 E. & B. 805, however, *Williams v. Jones* is confined in its operation to the special circumstances there appearing. The principle followed in the later case is this, that where new rights are given by a statute with specific remedies for their enforcement, the remedy is confined to those specifically given. This case was followed by the Court of Exchequer in *Austin v. Mills*, 9 Ex. 288. The same principle was applied in *Donnelly v. Stewart*, 25 U. C. R. 398, in which it was held that an action will not lie in a County Court upon a Division Court judgment. None of these authorities appear to have been cited to the learned Judge in the present case.

Under the statute here in question, a new right is given to a deserted wife of obtaining from a police magistrate in a summary manner an order for the payment by her husband of a sum of money for her support. She may

proceed in this way, or she may proceed by action to recover alimony. If she proceeds under the statute, her rights are subject to its provisions, one of which is that the payment of the money can only be enforced in the manner pointed out by the statute, and that if the husband succeeds in shewing the magistrate that he is unable to pay, payment will not be enforced. To allow the wife or her representatives to recover by action the amount ordered to be paid would take away from the husband this protection. Similar reasoning was held sufficient in the cases I have referred to, to shew that the actions sought to be maintained in them would not lie. I am of opinion that I am bound to hold in the present case that the action will not lie, and to order prohibition.

I think, under the circumstances, I should not give costs to either party.

Judgment.
Street, J.

[QUEEN'S BENCH DIVISION].]

CANN V. KNOTT ET UX.

Execution—Free grants and homesteads—Exemption from execution—Interest of original locatee as mortgagee after alienation.

The judgment of **BOYD, C.**, 19 O. R. 422, affirmed.

Statement.

The defendant Elizabeth Knott appealed from the judgment of **BOYD, C.**, 19 O. R. 422, where the facts of the case are set out.

The appeal was argued before the Divisional Court (**ARMOUR, C. J.**, and **STREET, J.**) on the 20th November, 1890.

Foy, Q. C., for the defendant Elizabeth Knott.

D. Urquhart, for the plaintiff.

December 31, 1890. The judgment of the Court was delivered by

STREET, J.:—

Judgment.

We are of opinion that the decision of the Chancellor should not be interfered with. We think that the transfer of the mortgages, under the circumstances, was properly held to be void against the plaintiff's execution, and we agree that the mortgages which James Knott took back to secure the purchase money of the two parcels he sold are not protected from seizure under the "Free Grants and Homesteads Act," R. S. O. ch. 25, both for the reason that the privilege of exemption in the locatee is confined to his original title as locatee, and not to a title acquired through a third party afterwards, although the land acquired may have been originally held by the grantee as locatee, and also because the expressions used in the section giving the privilege lead to the conclusion that the interest of a mortgagee is not such an interest in land as is intended to be covered.

We think the motion should be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

WESTERN ASSURANCE COMPANY V. ONTARIO COAL
COMPANY.

Insurance, marine—General average contribution—Attempt to rescue vessel and cargo—Common danger—Average bond—Adjustment—Expenditure—Liability of owners of cargo.

The judgment of BORD, C., 19 O. R. 462, affirmed.

The plaintiffs appealed from the judgment of BOYD, C., Statement.
19 O. R. 462, where the facts of the case are set out.

The appeal was argued before the Divisional Court, (ARMOUR, C. J., and STREET, J.,) on the 1st December, 1890.

Osler, Q. C., and A. W. Aytoun-Finlay, for the plaintiffs.

Delamere, Q. C., and D. Urquhart, for the defendants.

December 31, 1890. The judgment of the Court was delivered by

STREET, J. :—

We have gone over the evidence in this case, and have Judgment.
considered the authorities to which we were referred upon the argument, and can come to no other conclusion than that at which the learned Chancellor arrived in his judgment.

The motion must, therefore, be dismissed with costs.

[CHANCERY DIVISION.]

BANKS ET AL. V. THE CORPORATION OF THE TOWNSHIP OF
ANDERDON ET AL.

Public schools—Protestant separate school—Invalid extension of boundaries of school section.

The boundary of a Protestant separate school section cannot be extended into or over an adjoining public school section, where the teacher in the latter is not a Roman Catholic.

Statement.

THIS was an action by a ratepayer of the township of Anderdon, and the Public School Trustees of school section No. 1 of the township, to declare that a Protestant separate school was illegally established in school section No. 4, or that the by-law of the township, extending the boundaries of the separate school district, so as to include part of school section No. 1, was invalid.

The action was tried at Sandwich, on November 24th, 1890, before BOYD, C.

By section 1 of C. S. U. C. ch. 64, (R. S. O. ch. 227, sec. 1) upon the application in writing of a certain number of heads of families, a township council may authorize the establishment of a Protestant separate school, the limits of the section being prescribed by the council, but by section 6 (sec. 7 R. S. O. ch. 227) no such school shall be allowed in any school section, except where the teacher of the public school is a Roman Catholic.

It appeared from the minutes of the township council that a petition was in 1861 presented to the council by public school supporters of school section No. 4 asking for a Protestant separate school. The teacher in the public school of section 4, was a Roman Catholic at the time. The minutes of the council did not show that the necessary formalities were observed, but the fact

appeared that a Protestant separate school was established thereafter, and had been maintained down to the present time. The evidence showed that in school section No. 1 the teacher had always been a Protestant, but in 1864 the council passed a by-law extending the boundaries of the Protestant school district so as to include a portion of school section No. 1. From the passing of the by-law the rates collected in school section No. 1 from supporters of the Protestant separate school were sent to the trustees of that school.

Armour, Q.C., and Kirkland, for plaintiffs.

McHugh and J. L. Murphy, for defendants.

December 6, 1890. BOYD, C. :—

I find that there has been lawfully established a Protestant separate school in public school section No. 4, of the township of Anderdon, which dates back to 1861. In 1864, the municipality assumed to extend the boundaries of that separate school section, so as to include school section No. 1, in which the teacher of the public school was not a Roman Catholic. There is evidence that the public school teacher in No. 1 has always been a Protestant, so that this extension of the area of the Protestant separate school (validly established in respect of section 4) appears to be in direct conflict with the prohibition contained in sec. 6 of the Act then in force (Con. Stat. U. C. ch. 65), and which is still in force as sec. 7 of the Separate School Act, R. S. O. 1887, ch. 227.

Though by section 1 of the Con. Stat. U. C. ch. 65, the council are to prescribe the limits of the separate school division, that must be so read as to harmonize with section 7, (R. S. O. 1887, ch. 227) which forbids the allowance of any Protestant separate school in any school section except where the teacher of the common school in such section is a Roman Catholic. I find no power in the law as it then existed, to extend the area of a Protestant separate school

Judgment.
Boyd, C.

section upon the mere motion of the council ; but the fatal objection, apart from this, is such an extension into a school section where the teacher is not a Roman Catholic.

This part of the by-law cannot be validated by original consent or by lapse of time as against a new generation of dissentients. This much seems tolerably clear ; as to what is the effect of Con. Stat. U. C. ch. 64, sec. 126, in particular cases it is not needful now to determine.

For the present litigation I declare that the by-law 36, so far as it purports to extend the area of the protestant separate school district into and over public school section one in the township of Anderdon is *ultra vires*, and contrary to law, and I enjoin the municipal authorities from acting under that by-law in obtaining rates for the sustenance of the Protestant separate school established in No. 4.

Owing to the delay and the conditions which have arisen on faith of the municipal legislation which I now disturb, I will suspend the enforcement of this judgment for a reasonable time to enable proper adjustments to be made, as to which the parties interested can be heard if desired.

It is not a case for costs.

G. A. B.

[CHANCERY DIVISION.]

RE ABBOTT AND MEDCALF.

Mortgage—Power of sale—Notice of sale—Execution creditor.

In taking proceedings under a power of sale in a mortgage drawn under the "Short Forms Act," execution creditors of the mortgagor come within the scope of the word "assigns," and as such are entitled to notice under power of sale, but only those having executions in the sheriff's hands at the time notice of default is given, need be served.

THIS was an application under the Vendor and Purchaser Statement Act, R. S. O. ch. 112.

The property had been sold under a power of sale in a mortgage drawn under the Short Form Act, in these words: "Provided that the said mortgagee on default of payment for one month may on giving one month's notice enter on and lease or sell the said lands."

At the time of default notice of exercising the power of sale was given to the mortgagor, and to the only execution creditor who then had an execution in the sheriff's hands, but before the sale was carried out three other execution creditors placed writs in the sheriff's hands, and the purchaser objected to the title on the ground that these three execution creditors had not been served with notice.

The petition was argued on January 7, 1891, before BOYD, C.

Worrell, Q.C., for the petitioner, the vendor. There are two points: (1) Are the execution creditors of a mortgagor entitled to notice at all? (2) Assuming that they are, are those entitled whose writs are placed in the sheriff's hands after a notice has been given to all entitled at the time of giving?

There is no direct authority that execution creditors are assigns within the meaning of a power of sale: *Darling v. Wilson*, 16 Gr. 255, only refers to their rights to participate in the proceeds of a sale. Here there was no

Argument.

surplus. If they are assigns, they cannot take by their writ more than the debtor had. If they are entitled to notice they would be entitled to more than their debtor, as he having received notice, was not entitled to a further one. In a foreclosure action only those encumbrancers are added as parties in the Master's Office whose encumbrances existed at the date of the issue of the writ. The reason of this as stated in decided cases is, that otherwise the plaintiff might be indefinitely prevented from prosecuting his remedy by the creation of new encumbrances *pendente lite*. The same reason applies to proceedings to sell under a power. I refer to 5 C. L. T. p. 5; Holmested and Langton's Judicature Act, 221; *Wallbridge v. Martin*, 2 Ch. Ch. 275; *Robson v. Argue*, 25 Gr. 407; *The Bishop of Winchester v. Paine*, 11 Ves. 194; R. S. O. ch. 64, sec. 23.

Coatsworth, for the purchaser. As to the first point, if an execution creditor is a derivative mortgagee *in invitum* as held in *Darling v. Wilson*, 16 Gr. 255, he must be an assignee of the mortgagor. Execution creditors have a right to redeem: *Sheldon v. Chisholm*, 3 Gr. 655; *Waters v. Shade*, 2 Gr. 457. As to the second point, there is no direct authority. The facts are, default was made January 11th, 1890, notice served February 15th 1890, property put up for sale, May 10th, 1890, sale adjourned to May 17th, 1890; no bids then, and on July 8th, sold by private sale. The first execution was put in sheriff's hands April 26th, 1889. The others then came in March 5th and 24th, and April 15th, 1890.

[BOYD, C.—It seems to me that after notice was given to the mortgagor, the subsequent execution creditors took in his place and so had notice. If the mortgagee had to search every day until the expiry of the length of the notice, it would impose serious hardship on him.]

Worrell, Q.C., in reply. The power of sale provides for the division of the surplus (if any) among all those entitled, including the subsequent execution creditors, so that they are not excluded from their interest in the proceeds of sale by not receiving notice.

January 8th, 1891. BOYD, C.:—

Judgment.

Boyd, C.

“Assigns” is applicable to persons taking under another by operation of law, and it may include, I think, the execution creditor of a mortgagor who has placed a writ against lands in the sheriff’s hands. By sec. 23 of the “Execution Act,” R. S. O. ch. 64, the effect of seizure or taking in execution is to affect the interest of the mortgagor at the time the writ was placed in the hands of the sheriff, and it has been held that the operation of an execution against an interest in lands is in effect that of an incumbrance *in invitum*: *Darling v. Wilson*, 16 Gr. 255. This effect arises from the default or neglect of the debtor to pay, and in this sense the incumbrance is a voluntary and not a compulsory act, though brought about by the Legislative enactment. To borrow the expression of Lush, L. J., in *Gathercole v. Smith*, 17 Ch. D. at p. 10, the mortgagor having the equity of redemption may incumber that estate indirectly by suffering a judgment and execution which would be *pro tanto* an assignment. Because, unless the context requires, the word “assign” is not to be read in a narrow or restricted meaning: *McBean v. Deane*, 30 Ch. D. 531.

Looking at the course of legislation, in and after the the Revised Statute. (51 Vict. ch. 15, sec. 4, and 53 Vict. ch. 27, providing for notice to subsequent incumbrances) I should say that the Short Form of Mortgage Act contemplates generally the giving of notice to all who are entitled to redeem at the time when notice is given; and in that view a judgment creditor who has lodged execution with the sheriff is an assign of the mortgagor to whom notice should be given.

That direction of the statute was, however, satisfied in this case: all persons entitled to notice, after default, received it. It was not needful to give new notices thereafter to persons putting executions in the sheriff’s hands from time to time before the actual sale; otherwise the right to sell might be indefinitely postponed by the incoming of execution creditors subsequent to the first notice. The execu-

Judgment. tion creditors take only what the mortgagor can give, and if
Boyd, C. he has had notice of sale upon default, those putting in executions subsequently stand in his shoes as to such notice, and cannot exact the service of any further or other notice. Those having executions in force prior to the giving of the notice, come within the provisions of the Act—those after, are not within the meaning of the contract as to notice before selling.

I overrule the purchaser's objection with costs.

G. A. B.

[QUEEN'S BENCH DIVISION.]

REGINA V. POPPLEWELL.

Criminal law—Threatening letter—Accusation of abortion—“Not less than seven years,” meaning of.

A crime punishable by law with imprisonment for not less than seven years means a crime the minimum punishment for which is seven years; and, as no minimum term is prescribed for the crime of abortion, sending a letter threatening to accuse a person of that crime is not a felony within the meaning of R. S. C. ch. 173, sec. 3.

CROWN case reserved for the consideration of the Justices Statement of the Queen's Bench Division, by the chairman of the General Sessions of the Peace for the county of York.

The indictment was for feloniously sending to one Henry Wallwin a certain letter threatening to accuse him of abortion, a crime punishable by law with imprisonment for not less than seven years, with a view and intent thereby to extort and gain money, &c.

The prisoner was convicted.

The question for the opinion of the Court was whether, assuming a person to have sent, knowing the contents thereof, a letter threatening to accuse another person of the crime of abortion, with a view to extort gain thereby, would he be properly indicted under R. S. C. ch. 173, sec. 3, which is as follows :

“Every one who sends, delivers, or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing, accusing or threatening to accuse any other person of *any crime punishable by law with death, or imprisonment for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as hereinafter defined, with a view or intent, in any of such cases, to extort or gain, by means of such letter or writing, any property, chattel, money, valuable security, or other valuable thing from any person, is guilty of felony, and liable to imprisonment for life.* * *”

Statement.

By R. S. C. ch. 162, sec. 47, it is provided that “* * every one who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent, is guilty of felony, and liable to imprisonment for life.”

By R. S. C. ch. 181, sec. 26, it is provided as follows :

“Every one who is liable to imprisonment for life, or for any term of years, or other term, may be sentenced to imprisonment for any shorter term : Provided, that no one shall be sentenced to any shorter term of imprisonment than the minimum term, if any, prescribed for the offence of which he is convicted.”

November 26, 1890. The case was argued before ARMOUR, C. J., FALCONBRIDGE and STREET, JJ.

George Lindsey, for the prisoner. Abortion is a crime punishable with imprisonment for less than seven years. The English enactment (24 & 25 Vic. ch. 96) from which R. S. C. ch. 173, sec. 3, is taken, aimed at rape in fixing the term of seven years. See Archibald's Criminal Statutes, pp. 230-233 ; Taschereau's Criminal Statute Law, p. 614 ; Cox's Principles of Punishment, p. 110. Our own statute is also intended for rape and its cognate crimes. The words “not less than” cannot mean “at least.”

J. R. Cartwright, Q.C., for the Crown. If the statute refers only to rape and its cognate crimes it takes a very clumsy and roundabout way of saying so. I submit the statute must receive a reasonable construction. *Garby v. Harris*, 7 Ex. 591, shews the meaning of the words “less than” in a statute.

Lindsey, in reply. The proper reading is very plain in the English enactment, which omits the comma after “death.”

December 31, 1890. The judgment of the Court was Judgment.
delivered by Armour, C.J.

ARMOUR, C. J. :—

The prisoner was indicted under R. S. C. ch. 173, sec. 3, for feloniously sending a letter to the prosecutor threatening to accuse him of a crime punishable by law with imprisonment for not less than seven years.

The letter given in evidence contained a threat to accuse the prosecutor of procuring an abortion, a felony rendering the person found guilty thereof liable to imprisonment for life: R. S. C. ch. 162, sec. 47.

By R. S. C. ch. 181, sec. 26, it is provided that every one who is liable to imprisonment for life, or for any term of years, or other term, may be sentenced to imprisonment for any shorter term: Provided, that no one shall be sentenced to any shorter term of imprisonment than the minimum term, if any, prescribed for the offence of which he is convicted.

There is no minimum term of imprisonment prescribed for the crime of abortion; consequently sending a letter threatening to accuse a person of the crime of abortion is not sending a letter threatening to accuse him of a crime punishable by law with imprisonment for not less than seven years, which means a crime the minimum punishment for which is seven years.

The conviction must, therefore, be quashed.

[QUEEN'S BENCH DIVISION.]

REGINA V. MILFORD.

Criminal law—Fortune telling—9 Geo. II. ch. 5.

The statute 9 Geo. II. ch. 5 is in force in this Province.

By the statute the mere undertaking to tell fortunes constitutes the offence; and a conviction was affirmed where it was obtained upon the evidence of a person who was not a dupe or victim but a decoy.

Statement.

CROWN case reserved for the consideration of the Justices of the Queen's Bench Division by the Chairman of the General Sessions of the Peace for the county of York.

The prisoner was indicted for that she did unlawfully undertake to tell fortunes, to wit, the fortune of one Caroline J. Adams, against the form of the statute 9 Geo. II. ch. 5.

Caroline J. Adams, called for the Crown, swore that she went to a house where she saw the prisoner. The prisoner opened the door, took the witness up stairs, sat down beside her, took hold of her hand, looked at the palm, and read her fortune. She paid her fifty cents, which she said was her charge.

Cross-examined, the witness said "I am under a salary from the city of Toronto as Police Court matron. Police Inspector Archibald sent me up to the prisoner. I went to see if the prisoner was doing what the inspector suspected. I am under the inspector. I had no faith in the arrangement. I was not duped or victimized. The fifty cents was supplied by the inspector.

The prisoner's counsel at the close of the case for the Crown submitted the objections that the statute 9 Geo. II. ch. 5 *had no application in Ontario, and that on the

*9 Geo. II. ch. 5—Be it enacted ** that the statute made in the first year of the reign of King James the first, intituled *An Act against Conjurat[i]on, Witchcraft, and dealing with evil and wicked Spirits*, shall, from the twenty-fourth day of June next, be repealed and utterly void and of none effect (except so much thereof as repeals the statute made in the fifth

evidence Caroline J. Adams was not of the class of persons intended to be protected by the statute.

The prisoner was found guilty.

The Chairman reserved the questions of law arising upon these objections.

The case was argued before ARMOUR, C. J., FALCONBRIDGE and STREET, JJ., on the 26th November, 1890.

Murdoch, for the prisoner. The statute is not in force in this country, and if it is, the complainant does not come within the class of dupes or victims intended by the

year of the reign of Queen Elizabeth, intituled *An Act against Conjurations, Inchantments, and Witchcraft*).

2. And be it further enacted * * that from and after the said twenty-fourth day of June, the Act passed in the Parliament of Scotland in the ninth Parliament of Queen Mary, intituled *Anentis Witchcraft* shall be and is hereby repealed.

3. And be it further enacted that from and after the said twenty-fourth day of June, no prosecution, suit, or proceeding shall be commenced or carried on against any person or persons for Witchcraft, Sorcery, Inchantment, or Conjuraton, or for charging another with any such offence, in any Court whatsoever in Great Britain.

4. And for the more effectual preventing and punishing any pretences to such arts or powers as are before mentioned, whereby ignorant persons are frequently deluded and defrauded; Be it further enacted * * that if any person shall, from and after the said twenty-fourth day of June, pretend to exercise or use any kind of Witchcraft, Sorcery, Inchantment, or Conjuraton, or undertake to tell fortunes, or pretend from his or her skill or knowledge in any occult or crafty science to discover where or in what manner any goods or chattels, supposed to have been stolen or lost, may be found; every person so offending, being thereof lawfully convicted on indictment or information in that part of Great Britain called England, or on indictment or libel in that part of Great Britain called Scotland, shall for every such offence suffer imprisonment by the space of one whole year without bail or mainprize, and once in every quarter of the said year in some market town of the proper county upon the market day, there stand openly on the pillory by the space of one hour, and also shall (if the Court by which such judgment shall be given shall think fit) be obliged to give sureties for his or her good behaviour, in such sum and for such time as the said Court shall judge proper according to the circumstances of the offence, and in such case shall be further imprisoned until such sureties be given.

Argument. statute. This is the first prosecution in Canada, and there are no cases.

J. R. Cartwright, Q.C., for the Crown. Wharton's *Law Lexicon*, Title *Witchcraft*, says that the statute is still in force in England. I refer to *Regina v. Barnes*, 45 U.C.R. 276.

December 31, 1890. The judgment of the Court was delivered by

ARMOUR, C.J.:—

There seems to be no doubt that the statute 9 Geo. II. ch. 5 was in force in England on the 17th September, 1792, and was imported into this country by the Act of Upper Canada 40 Geo. III. ch. 1.

The principle established by *Regina v. Barnes*, 45 U.C. R. 276, and the cases therein cited, apply with equal force to this Act.

By it the mere undertaking to tell fortunes constitutes the offence; and the defendant having been found guilty of so doing, the conviction must be affirmed.

[QUEEN'S BENCH DIVISION.]

RE FIELD V. RICE—VAUGHAN, GARNISHEE.

RE FORD V. RICE—VAUGHAN, GARNISHEE.

Prohibition—Division Court—Garnishee suit—Money handed by prisoner to constable—Question of fact.

The defendant was arrested, and when taken to the police station handed over the money in his possession to a constable. Creditors of the defendant sought to garnish this money by Division Court suits. The Judge in the Division Court found that the money was handed over voluntarily, and held that it could be garnished :—
Held, that the question whether the garnishee was indebted to the defendant was a question of fact within the jurisdiction of the inferior Court, and that prohibition would not lie.

AN application by the primary debtor in two garnishee Statement.
 plaints in the first Division Court in the county of Brant, to prohibit the Court from proceeding to direct payment over to the primary creditors of the moneys attached, which had been paid into Court by the garnishee.

The primary debtor was arrested at Brantford on a charge of obtaining money under false pretences. When taken to the police station, he had in his possession the money now in question, and also a watch, and he handed both over to a police officer, who gave them to the chief of police, the garnishee.

The Judge in the Division Court gave judgment in favour of the primary creditors after consideration, and stated the facts and his findings and reasons in writing. He found as a fact that when in the station the primary debtor *voluntarily* handed over the money and watch to the police officer.

The motion for prohibition was argued before GALT, C. J., in Chambers, on the 15th September, 1890.

Du Vernet, for the primary debtor, contended that, under the circumstances, the money was not in the possession of Vaughan, as a bailee, but was held by him as chief of police, and being therefore *in custodia legis* was not liable to

Argument. be garnished as a debt due by the garnishee to the judgment debtor.

S. A. Jones, for the primary creditors, contra.

September 18, 1890. GALT, C. J.—(after stating the facts as above)—

I would quite accede to the proposition of Mr. Du Vernet, if the finding of the learned Judge were, in my opinion, erroneous. But the circumstances tend strongly to sustain his finding of the fact—viz: that the parting with the money was the voluntary act of Rice. There was no reason whatever that in this case the watch as well as the money should have been taken from Rice; it was a question of fact as to whether the act of Rice was voluntary or not; there was no contradictory evidence; and the learned Judge who tried the case has found such was the fact. The motion is, therefore, dismissed with costs.

The primary debtor appealed, and his appeal was argued before the Divisional Court (ARMOUR, C.J., and STREET, J.) on the 20th November, 1890.

Du Vernet, for the appellant. The Judge in the Division Court found the fact to be that the appellant voluntarily handed over the money. Under sec. 442 of the Municipal Act, R. S. O. ch. 184, police commissioners have power to make regulations, and the police commissioners at Brantford made a rule that the police officers should require persons arrested to give up their money, &c. The facts are not in dispute, and the Judge has given himself jurisdiction by ruling erroneously, as I submit, that there can be no garnishment. Prohibition therefore will lie: *Re Macfie v. Hutchinson*, 12 P. R. 167; *Re Long Point Co. v. Anderson*, 19 O. R. 487. The money could not be garnished in the hands of Vaughan; there was no debt from him to the appellant, and no contract by him or the inferior police officer to pay money. I refer to *Re Baird*

v. *Nolan*, recently before ROSE, J.*; *Rex v. Jones*, 6 C. & Argument P. 343; *Rex v. Barnett*, 3 C. & P. 600; *Rex v. O'Donnell*, 7 C. & P. 138; *Rex v. Kinsey*, *ib.* 447; *Robinson v. Howard*, 7 Cush. 257; *Phillips v. Austin*, 3 C. L. T. 316; *Morris v. Penniman*, 14 Gray (Mass.) 220; *Dolphin v. Layton*, 4 C. P. D. 130.

S. A. Jones, for the primary creditors, referred to *In re Jenkins v. Miller*, 10 P. R. 95; Drake on Attachment, 5th ed., sec. 506; Sinclair's Division Courts Act, ed. of 1888, p. 58.

* RE BAIRD V. NOLAN, a decision of ROSE, J., on the 12th November, 1890, was also upon a motion for prohibition to a Division Court in a garnishee suit.

ROSE, J.—Following *Re Macfie v. Hutchinson*, 12 P. R. 167, and *Re Long Point Co. v. Anderson*, 19 O. R. 487, I think a motion for prohibition will lie. There was no dispute as to facts. The Judge in the Division Court made the following statement:—*Nolan*, the primary debtor, was arrested on a charge of assault, and when brought to the station he gave up to the garnishee, Cruickshank, who had apprehended him, a sum of money in bank bills. * * He did this without any compulsion, after having been told that it was the rule to search all persons. A receipt was given for the money, and the roll of bills was marked and placed in a safe.

Taking this with the evidence of Cruickshank, it appears to me that it is a finding that the money was handed over in pursuance of a demand and not voluntarily, *i. e.*, under compulsion. See *Robinson v. Howard*, 7 Cush. 257.

Thus, it seems to me, it is not necessary to determine whether the money was *in custodia legis*. If it was not and if the officer had no right to demand and retain it, then he was guilty of a tort, and the prisoner might recover for the tort, and in estimating the damages the amount thus taken would no doubt be allowed for. But whether rightfully or wrongfully taken, it is clear that the prisoner when entitled to a return would be entitled to a return of the specific articles taken, and it does not appear to me to make any difference whether it was a roll of bills or a watch. Clearly there was no debt due. That the prisoner might have waived the tort, and sued for the amount as money held to his use, as has been argued, would make no difference.

This question was not considered in the cases of *Re Field v. Rice* and *Re Ford v. Rice*, before the learned Chief Justice Galt, and therefore I am not holding against any view expressed by him.

The motion will be granted with costs, to be set off against the debt.

Judgment. December 31, 1890. The judgment of the Court was
Armour, C. J. delivered by

ARMOUR, C.J. :—

The question to be determined by the learned Judge of the County Court was a pure question of fact, to be determined by him upon the evidence adduced before him on the trial, and resolved itself into this: Was Vaughan indebted to Rice as alleged? This was a question of fact entirely within his jurisdiction, and we have no right to sit in review upon his finding of fact in a matter within his jurisdiction, and prohibition will not lie.

The appeal must, therefore, be dismissed with costs.

[CHANCERY DIVISION.]

SCOTT ET AL. V. SCOTT.

Life insurance—Benevolent society—Endorsement on policy—Subsequent devise of moneys repugnant to endorsement—Executors disqualified as trustees—Appointment of trustee—R. S. O. ch. 136, s. 5.

A testator insured his life in a benevolent society, the policy being payable to his "widow or orphans or personal representatives," and afterwards endorsed on the policy a direction that the same should be paid to his infant daughter. Subsequently by his will he devised the proceeds of the policy with other moneys to his executors upon certain trusts :—

Held, that the will was inoperative so far as it assumed to deal with the policy which was by the endorsement clothed with a statutory trust under section 5 of R. S. O. ch. 136, in favour of the daughter, and that as the devise to the executors was repugnant to the trust they were not competent trustees within the meaning of section 11 of the above mentioned act.

The mother of the infant having been appointed guardian and having given security for the proper application of the policy moneys was appointed trustee.

THIS was a petition stating a special case between Statement. Joseph Scott and James Banning, executors of James Hamilton Scott, deceased, and Martha Adrianna Scott, the widow of the latter, guardian of her daughter Laura Eliza Scott, as to which of them was entitled to the proceeds of an insurance policy which had been paid into Court.

James Hamilton Scott had on March 23rd, 1886, entered into a contract of life insurance with the Independent Order of Foresters, a benevolent society, for the sum of \$3,000 conditioned to be paid (after the failure of certain events in which it might be paid to him in his lifetime), "to the widow or orphans or personal representatives of the said brother* (J. H. Scott) on due and satisfactory proof of his death, &c."

Subsequently Scott executed an instrument in writing endorsed on said policy in these words, "I hereby direct that the Endowment Benefit due at my death on this Endowment Certificate shall be paid to my daughter, Laura Eliza Scott."

* Referring to the Brotherhood of the Order of Foresters.—*REP.*

Statement.

Some months later he made his will, in which after making certain bequests he devised to his executors all the rest of his real and personal estate "including the proceeds of a life insurance policy in the Independent Order of Foresters for the sum of three thousand dollars" on certain trusts, and died on 10th June, 1890.

The proceeds of the policy were paid into Court by the Independent Order of Foresters as the fund was claimed by the executors under the will, and by the widow (who had been appointed by the Surrogate Court guardian to her infant daughter Laura Eliza) by virtue of the endorsement on the policy.

The following questions were submitted to the Court by the petition: (1) Whether under the terms of the policy and endorsement and of the will the executors or the guardian were entitled to the proceeds of the policy. (2) Whether the will was valid in so far as it assumed to deal with the said policy. (3) And how should the costs of getting the money paid into Court and of this case be disposed of.

The matter came on for trial at Chatham at the Fall Sittings for 1890, and was adjourned for argument to Toronto, which argument took place on December 6, 1890, before BOYD, C.

D. M. Christie, for the petitioners, the executors. The testator by his will appointed the plaintiffs his executors, and they are entitled to the proceeds of the policy to be held by them for the purposes directed: R. S. O. ch. 136, secs. 11 and 12; *Wicksteed v. Munro*, 10 O. R. 283; 13 A. R. 486. The respondent is the widow of the insurer and testator, and has also been appointed guardian of the daughter by the Surrogate Court.

W. M. Douglas, for the respondent. No person has been appointed, under the statute securing to wives and children the benefit of life insurance, R. S. O. ch. 136, to deal with the policy after the endorsement. Section 6 of

the Act does not apply as it only extends to cases of ap-^{Argument.}portionment. The will is inoperative because of the endorsement: secs. 5, 7, 8 and 9. The infant daughter's share should go to the mother as surrogate guardian: sec. 12. The testator has not purported to act under sec. 11. Sec. 13 shews it must be a special investment for the benefit of children, and that is inconsistent with the power to invest given by the will. I also refer to *Wicksteed v. Monro*, 10 O. R. 283; 13 A. R. 486.

December 22nd, 1890. BOYD, C. :—

The policy, though for the benefit of the widow or orphans of the insured, and not in words for his wife or children, is yet I think within the meaning of sec. 5 of the Act, R. S. O. ch. 136. The effect of his endorsing on the policy that the moneys due at his death should be paid to his daughter, is to withdraw that money from his control, so that upon his death it does not "form part of his estate." Such money, however, is still money payable "under the policy," and the insured may, by sec. 11, appoint trustees to receive and invest such money when the person entitled is (as here) an infant.

This, I think, contemplates the appointment of trustees pure and simple who are evidently to be distinguished from the executors of his own proper estate (see sec. 12), and whose functions are to deal with the estate during the minority of the infant entitled pursuant to the trust for that child declared by sec. 5 as the effect and result of the endorsement in her favour.

In the present case the testator has directed his executors to hold this and other moneys in trust with directions repugnant to the absolute right of the daughter to the possession of the particular fund from the policy upon her attaining twenty-one years of age. He directs that it shall go over to his father if she died before that age. It would lead to confusion to let this fund be mingled with the other proper estate of the testator in the hands of the

Judgment. executors, and I think these executors are not competent
Boyd, C. trustees within the meaning of the Act.

The mother has, I understand, been duly appointed guardian of her daughter, and has given satisfactory security for the faithful performance of her duties and the proper application of this money (see sec. 14). If so, I prefer that the money should be entrusted to her rather than to the executors and trustees of the will.

To the questions submitted in the special case I make answer: (1) The guardian is entitled to receive the proceeds of the policy. (2) The will is invalid so far as it assumes to deal with the said policy, inasmuch as the trusts imposed upon the trustees named with reference to the insurance moneys are inconsistent with the statutory trust created by the endorsement on the policy. (3) I think the costs incurred on the application to have the money paid in and of this case, should be out of the fund to both parties as between solicitor and client.

G. A. B.

[QUEEN'S BENCH DIVISION.]

REGINA V. PETRIE.

Criminal law—Trial of prisoner by Judge without jury—Right of Judge to view locality of offence—Absence of prisoner—Question of law arising on trial.

The prisoner was tried without a jury by a County Court Judge, exercising jurisdiction under the "Speedy Trials Act," upon an indictment for feloniously displacing a railway switch. After hearing the evidence and the addresses of counsel, the Judge reserved his decision. Before giving it, having occasion to pass the place, he examined the switch in question, neither the prisoner or any one on his behalf being present.

The prisoner was found guilty :—

Held, that there was no authority for the Judge taking a "view" of the place, and his so doing was unwarranted ; and even if he had been warranted in taking the view, the manner of his taking it, without the presence of the prisoner, or of anyone on his behalf, was unwarranted :—

Held, also, that the question whether the Judge had the right to take a view was a question of law arising on the trial, and was a proper question to reserve under R. S. C. ch. 174, sec. 259.

Review of the cases on the questions whether either a Judge or a juror can be properly a witness in a case which he is trying.

CROWN case reserved for the consideration of the Justices **Statement** of the Queen's Bench Division.

The prisoner was indicted for that he did feloniously, unlawfully, and maliciously displace a railway switch, with intent thereby to endanger a certain railway engine and certain tenders, trucks, and carriages, &c. He was tried before the Judge of the County Court of the county of Carleton, exercising criminal jurisdiction under the provisions of the "Speedy Trials Act," without a jury. After the evidence was closed and counsel had addressed the Court, the Judge stated that he would read the evidence over and give his decision on the following morning. On his way to the Court House on the following morning the Judge passed the switch in question and stopped to examine it. The prisoner was not then present, nor was any one on his behalf. On the same day the prisoner was brought before the Judge again, and in his presence and that of his counsel, the Judge summed up the evidence and stated his conclusions and reasons therefor. In the course of his

Statement. observations he stated that he had examined the construction of the switch. He then recorded a verdict of "guilty."

The question stated for the opinion of the Court was whether the fact of the Judge's visiting the locality and inspecting the construction of the switch, in the manner and under the circumstances stated, rendered the verdict bad.

November 26, 1890. The case was argued before ARMOUR, C. J., FALCONBRIDGE and STREET, JJ.

Middleton, for the prisoner. The question is whether the Judge had the right to view the premises of his own motion, and without the prisoner being present. There is no right by statute to take a view; and there is no right at common law: *Regina v. Martin*, L. R. 1 C. C. R. 378. R. S. C. ch. 174, sec. 171, gives the right to let the jury have a view, but it must not be extended beyond its terms.

Dymond, for the Crown. This is not a question of law arising at the trial within the meaning of R. S. C. ch. 174, sec. 259. What the Judge did cannot be called taking a view. I refer to Taylor on Evidence, 6th ed., sec. 20.

Middleton, in reply, referred to 6 Geo. IV. ch. 50 (Imp.); Chitty, vol. 1, p. 482.

December 31, 1890. The judgment of the Court was delivered by

ARMOUR, C. J. :—

The question raised in this case was, in my opinion, a question of law arising upon the trial, and, as it was a question of considerable importance, the learned Judge did right to reserve it. See *Regina v. Gibson*, 16 O. R. 704, and cases there cited; *Regina v. Martin*, L. R. 1 C. C. R. 378.

The question raised necessarily raises two other questions intimately connected with it; one, whether a juror

can be properly a witness in a case he is sworn to try; the Judgment.
 other, whether a Judge can be properly a witness in a case Armour, C.J.
 which he is trying.

For the Judge trying a prisoner under "The Speedy Trials Act," is clothed with the functions of both a Judge and a jury, and has to exercise both.

In *Bennet v. Hartford*, Sty. 233: "It was said by the Court that if either of the parties to a trial desire that a juror may give evidence of something of his own knowledge, to the rest of the jurors, that the Court will examine him openly in Court upon his oath, and he ought not to be examined in private by his companions."

In *Fitz-James v. Moys*, Sid. 133, one of the jury was sworn as a witness and gave evidence and remained on the jury.

In *Rex v. Reading*, 7 Howell 259, Sir John Cutler was foreman of the jury, and before they were sworn, Reading said, "My Lord, I am very glad to see Sir John Cutler here, for I did intend to have his evidence for me"

To which the Lord Chief Justice answered, "That you may have, though he be sworn," (at p. 267).

In *Rex v. Heath*, 18 Howell 1, Proby, one of the jury sworn to try the prisoner, was sworn and examined as a witness.—(See pp. 46 and 123.)

In *Rex v. Perkins*, Holt 403, it is said, "In case a jury give a verdict upon their own knowledge, they ought to tell the Court so, but the fairest way would be for such of the jurors as had knowledge of the matter, before they are sworn, to inform the Court of the thing, and be sworn as witnesses:" 1 Salk. 405, *S.C.* See also *Smith v. Parkhurst*, Andr. 315, at p. 321.

In *Rex v. Bushell*, 6 Howell 999, in a note at p. 1012, it is said that "the late Mr. Justice Buller, in conversation concerning a case which had been tried before him, (*Smith v. Hollings*, Stafford, Spring Assizes, 1791,) told the editor that where a juryman has knowledge of any matter of evidence in a cause which he is trying, he ought not to impart the same privily to the rest of the jury, but should

Judgment. state to the Court that he had such knowledge, and there-
Armour, C.J. upon be examined, and subjected to cross-examination, as a witness."

In *Rex v. Rosser*, 7 C. & P. 648, the prisoner was indicted for stealing in the dwelling-house of Charles May a watch and seals, stated in the indictment to be of the value of £7. A witness for the prosecution having sworn that the property, in his opinion, was worth that sum, the jury, after the summing up, inquired if they were at liberty to put a value on the property themselves?

Parke, B., said: "If a gentleman is in the trade, he must be sworn as a witness. That general knowledge which any man can bring to the subject may be used without; but if it depends on any knowledge of the trade, the gentleman must be sworn."

In *Manley v. Shaw*, 1 Car. & M. 361, an action on a bill of exchange, after the handwriting of the defendant as acceptor had been proved, one of the jury, on looking at the bill, said that the stamp was a forgery.

Tindal, C. J., said: "The gentleman of the jury who says that the stamp is a forgery, should be sworn as a witness to give evidence to his brother jurors, before they can act upon his opinion." His Lordship then told the juryman that, if he thought proper, he might be sworn and examined as a witness to prove the forgery, but the juryman stated that he should decline being examined as a witness. See also *Rex v. Sutton*, 4 M. & S. 532.

I have met with no reported case within the last fifty years in England, in which a juror sworn to try has been sworn and examined as a witness, and the decisions in the United States upon the question are at variance.

It seems to me, however, that there are grave objections to a juror sworn to try being sworn and examined as a witness. If he refuses to answer and is committed for contempt, how is the trial to proceed? If his evidence is contradicted, is he to join in determining the question whether his evidence or that in contradiction is to prevail? If witnesses are called to attack his credibility, is he to

join in determining the question of his own credibility? Judgment.
Does he not, when he becomes a witness, necessarily cease Armour, C.J.
to be capable of impartially deciding the matter he is
sworn to try? Does he not become the partizan of his
own evidence, and opposed to the side upholding what is
contrary to it?

These are but some of the objections to a juror sworn to
try being sworn and examined as a witness, but when the
functions of the juror are united with those of the Judge,
it seems to me clear that the person in whom such func-
tions are united cannot be a witness in a cause which he
is trying.

In the report of the trial of the regicides in Kelyng, at
page 12, there is this memorandum: "That secretary
Morris and Mr. Annesley, president of the council, were
both in commission for the trial of the prisoners, and sat
upon the bench, but there being occasion to make use of
their testimony against Hacker, one of the prisoners, they
both came off from the bench, and were sworn, and gave
evidence, and did not go up to the bench again during
that man's trial; and agreed by the Court they were good
witnesses, though in commission, and might be made use
of."

In the case last cited the Court was properly constituted
without these gentlemen, but if their presence had been
necessary to the constitution of the Court, and if they
could not have absented themselves without breaking up
the Court, the case might have been different. The case,
however, shews that even in those days these gentlemen
did not think it proper that they should sit as judges
after having been sworn as witnesses in the case. In the
trial of Anderson and others for high treason, 7 Howell
811, it was said by the Recorder at page 874, "It is not
the business nor the duty of the Court to give any evidence
of any fact that they know of their own knowledge unless
they will be sworn for that purpose, for though they do
know it in their own private conscience to be true, yet
they are obliged to conceal their own knowledge unless
they will be sworn as witnesses."

Judgment. In *Hurpurshad v. Sheo Dyal*, L. R. 3 Ind. App. 259, the judicial committee said at page 286, "It ought to be known, and their Lordships wish it to be distinctly understood, that a Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts. If the means of knowledge of the judicial commissioner of the facts spoken to by him in his judgment, as depending upon his own knowledge, were capable of being tested, it would probably turn out that it depended upon mere rumour or hearsay, and that his evidence as to those facts would not have been admissible if he had been examined as a witness."

Armour, C.J. In *The People v. Miller*, 2 Parker Crim. Reps. 197, in the course of the trial the defendant offered as a witness on his behalf the Hon. Harvey Humphrey, the County Judge. It was objected on the part of the prosecution, that Judge Humphrey, being a member of the Court, could not be sworn as a witness. The objection was sustained, and the defendant excepted. The Court said, "We think this decision was correct. The Court could not be held without the County Judge, and it would have broken up the Court for the time being for him to take his stand as a witness. He could not act in the double capacity at one and the same time of Judge and witness. To make this apparent, it is only necessary to suppose a claim of privilege by the witness in regard to answering a question put to him, or his refusal to answer a question which his associates of the Court decide he is bound to answer, with a motion for his commitment, as being in contempt, until he should answer, or of evidence introduced to contradict or impeach him. Such things are possible in the nature of the case. If it should be said that the defendant might in this way be deprived of valuable evidence and exposed to a conviction for want of it, it is sufficient to say that the indictment might be removed to the Oyer and Terminer for trial; and if the presiding Judge on the trial in that Court was a material witness, it might be good ground for an adjournment until a Judge should take his seat who was not wanted as a witness."

In *Morss v. Morss*, 11 Barbour 510, it was held that one ^{Judgment} of three referees, who act in the place of both Judge and ^{Armour, C.J.} jury, could not be sworn and examined as a witness on the trial before them. This case contains a valuable review of the question under discussion, and repays perusal. See also *The People v. Dohring*, 59 New York 374; *Regina v. Brown*, 16 O. R. 41; *Regina v. Sproute*, 14 O. R. 375; *Ross v. Buhler*, 2 Martin (La.) N. S. 161.

Professor Greenleaf in his work on Evidence, 14th ed., sec. 364, says: "And whatever difference of opinion may once have existed on this point, it seems now to be agreed that the same person cannot be both witness and Judge in a cause which is on trial before him. If he is the sole Judge, he cannot be sworn; and, if he sits with others, he still can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another."

The question remains: Can a Judge trying a prisoner under the "Speedy Trials Act" have a view of the place where the offence was alleged to have been committed? And if he takes a view, does it vitiate the conviction?

It is clear that there is no statute authorizing the Judge to have a view in such a case, and we have to ascertain whether there is otherwise any authority in support of the right of a Judge to take such a view.

If the Court had power at common law, an inherent power, to order a view by a jury in a trial for a criminal offence, it might well be argued that when the functions of the jury devolved upon the Court by statute, the Court became possessed of the power itself to take a view.

The statute 4 Anne ch. 16, sec. 8, did not extend to criminal cases, and neither before it nor after it, until 6 Geo. IV. ch. 50, sec. 23, could a view be had in a criminal case without consent. See Burrows 253, in margin.

In *Rex v. Redman*, 1 Kenyon 384, there was a motion for a view on behalf of the defendant, who stood indicted for a forcible entry. Per Curiam.—There can be no view in a criminal prosecution without consent, and the practice

Judgmen was so before the Act (4 Anne ch. 16). See *Anonymous*, 1 Armour, C.J. Barnard 144; 2 Barnard 214; 2 Chitty 422; *Commonwealth v. Knapp*, 9 Pickering at p. 515, where it is doubted whether even with consent a view could be granted in a felony.

There was no authority, in my opinion, for the learned Judge taking the view which he took in this case, and such his proceeding was wholly unwarranted, and even if he had been warranted in law in taking the view, the manner of his taking it without the presence of the prisoner, or of any one on his behalf, was unwarranted.

Taking a view is receiving evidence, in a sense, and this cannot be done behind the back of a prisoner on trial upon a charge of felony.

I have no doubt the learned Judge acted quite innocently in taking the course he did, and that what he did in no way affected his judgment in the case, and worked no injustice to the prisoner, but that is not the question; the question is, was what he did warranted in law, and we are clearly of opinion that it was not, and that being unwarranted in law it avoided the conviction: *Regina v. Gibson*, 18 Q. B. D. 537; *Regina v. Bertrand*, L. R. 1 P. C. 520; *The People v. Eastwood*, 3 Parker Crim. Reps. 25; *Bostock v. State of Georgia*, 61 Geo. 635; *Doud v. Guthrie*, 13 Brad. (Ill.) 653; *Smith v. State*, 42 Texas 444; *Hattie v. Leitch*, 16 Court of Sessions (4th series) 1128.

It has been much discussed in the United States whether where a view is authorized by statute to be had by the jury in a criminal case, the accused is not entitled to be present at the view, and diverse decisions have been had on the subject.

I only refer to it in this case because it is a question which may be raised here. See Thompson on Trials, vol. 1, sec. 875; Central Law Journal, vol. 26, p. 436.

The conviction will, therefore, be quashed.

[CHANCERY DIVISION.]

PEUCHEN ET AL. V. IMPERIAL BANK ET AL.

Sale of goods—Implied warranty of title—Failure of consideration—Bill of lading—Transfer of interest under—Absolute sale by pledgees—Findings of jury—Inconsistency—Duty of trial Judge—R. S. C. ch. 120.

The plaintiffs sued a bank to recover the price paid the bank for certain goods which, owing to a customs seizure and forfeiture, the plaintiffs never received.

The bank was never in actual possession of the goods, but a bill of lading was indorsed to them as security for advances, and this bill of lading was indorsed and delivered by the bank directly to the plaintiffs.

The jury found that it was the bank which sold the goods to the plaintiffs; that they professed to sell with a good title; that they had not a good title; and that the plaintiffs could not by any diligence have obtained the goods :—

Held, that upon these findings and the evidence, and having regard to the provisions of the Bank Act, R. S. O. ch. 120, the transaction must be regarded as a sale by the bank as pledgees with the concurrence of the pledgor, and not as a mere transfer of the interest of the bank under the bill of lading; and that the plaintiffs were entitled to recover the price as upon an implied warranty of title and a failure of consideration.

Morley v. Attenborough, 3 Ex. 500, commented on and distinguished.

Held, also, per ROBERTSON, J., that the trial Judge was within his right and duty in sending the jury back to reconsider their findings after pointing out their inconsistency.

THE action was brought against the Imperial Bank and Statement. the Ontario Supply Company, to recover the sum of \$709.67, being the amount paid by the plaintiffs to the bank on a contract to sell to the plaintiffs twenty-five barrels of turpentine, stored in a bonded warehouse in Quebec.

The statement of claim alleged that on or about 21st November, 1889, the bank contracted and agreed with the plaintiffs to sell to them twenty-five barrels of turpentine, stored as above, at and for the price of fifty-three cents per gallon: that is to say, the sum of \$709.67, which the plaintiffs paid and the bank received; but the bank failed to deliver the turpentine to the plaintiffs in pursuance of said contract. There was also an allegation that the bank alleged that they dealt with the defendants the Ontario Supply Company, and sold the turpentine to them, and the plaintiffs in the alternative said that if this was

Statement. true, then the plaintiffs were entitled to recover from the Supply Company, &c., for their failure to supply to the plaintiffs the turpentine in pursuance of their agreement with the plaintiffs.

The facts were as follows :

In October, 1889, the Phoenix Oil Company, doing business in the United States, shipped by rail twenty-five barrels of turpentine, consigned to themselves at Quebec, and received from the railway company a bill of lading for the same. This bill of lading was annexed to a draft for the price of the turpentine, drawn on Anderson & Harper, and the bill of lading was indorsed, "Deliver to Anderson & Harper or order, (signed) Phoenix Oil Company, per J. P. Whelan;" and was sent to or came into possession of the Imperial Bank by indorsement in these words, "Deliver to the order of the Imperial Bank. (Signed) Anderson & Harper," as security for the amount of the purchase money covered by the draft and paid to the Phoenix Oil Company. Anderson & Harper failed to pay the draft on them to the bank, and the turpentine remained subject to the order of the bank. In November, 1889, the bank indorsed the bill of lading over to the plaintiffs, in these words: "Upon payment of freight and charges from Quebec, deliver to the order of A. G. Peuchen & Co., for Imperial Bank of Canada; O. F. Rice, manager," in pursuance of the contract set out in the pleadings, the plaintiffs having purchased from the bank the turpentine at fifty-three cents per gallon, for which they paid the bank \$709.67. The turpentine was not delivered to the plaintiffs; the customs authorities having seized and confiscated it for a breach of the revenue laws, whether before or after the sale to the plaintiffs did not appear, and the plaintiffs never received it.

At the trial, which took place before STREET, J., and a jury at the Toronto Assizes, the following questions were submitted to the jury :

1. Who sold the turpentine to the plaintiffs? Was it the bank or the Supply Company?

2. Did the sellers profess to sell with a good title, or did they not?

3. Had the sellers a good title?

4. Could the plaintiffs by any diligence have obtained the turpentine?

The jury, after retiring for some time, returned into Court, having answered the questions by stating in answer to the first, "The bank;" to the second, "Yes;" to the third, "Yes;" and to the fourth, "No;" whereupon a discussion took place between the learned Judge and the jury as to the inconsistency between the answers to the third and fourth questions, which ended in the jury being asked, against the consent of counsel for the bank, to retire again, which they did, and returned into Court, answering the third question "No," and giving the same answers as before to the rest of the questions.

On these findings the learned Judge ordered that judgment be entered for the plaintiffs against the bank for \$709.67, with interest from 27th November, 1889, and he dismissed the action against the Supply Company, with costs.

At the September Sittings of the Chancery Divisional Court, 1890, the defendants the Imperial Bank moved to set aside the findings of the jury at the trial and the order for judgment thereon, and for judgment for the defendants the bank, or for judgment for the bank on the findings of the jury as first returned to the trial Judge, or for a new trial, on the following amongst other grounds:

1. From the evidence and the written documents it is clear that the defendants the Imperial Bank of Canada were simply the holders of a bill of lading for twenty-five barrels of turpentine, the property of the firm of Anderson & Harper, which the bank held as collateral security to a draft, and which bill of lading came into the hands of the bank in the ordinary course of their banking business, and within the powers conferred by the Bank Act.

2. The said bank indorsed the bill of lading to the plaintiffs, directing the carriers to deliver to the plaintiffs

Statement.

on payment of charges at Quebec. The strongest position against the bank is their indorsement of the bill of lading to the plaintiffs. The trial Judge took the view on the law that it was the duty of the bank to deliver the turpentine covered by the bill of lading to the plaintiffs, and that the indorsement was a warranty of title and quality. It is clear in law that all these positions are wrong, and that the bank by indorsing the bill of lading to the plaintiffs did not warrant title to the turpentine, was not bound to deliver possession, and did not warrant quality, but only gave the plaintiffs their position.

3. It is clearly established by the evidence that the turpentine was in existence, that the bank had a title, and that the plaintiffs did not shew why they did not get possession, the only evidence being a statement made some months after the transfer of the bill of lading that the turpentine had been seized by the authorities at Quebec. It is submitted that unless the plaintiffs prove that the bill of lading which the bank transferred to them was a forgery, or that no goods in fact were ever shipped under it, their action against the bank must fail; and, as the evidence clearly shews, the bill of lading was valid, the goods were in existence, the bank had a good title and, as the bank were not bound to deliver possession in law, did not warrant quality or title in law, the cause of action must fail, and judgment should have been entered for the said defendants notwithstanding the findings of the jury.

4. It is clear that the bank could only deal with the turpentine under the provisions of the Bank Act, and that the questions put to the jury and answered by them do not in law make the bank liable, even if the bank did sell as found by the jury. The written contract must be looked at to see what the contract to sell was, and by that written contract it is clear in law that the bank were not bound to deliver possession, and that they did not warrant title.

5. The evidence as to the seizure of the goods at Quebec does not affect the bank. The seizure of the goods at Quebec was not for defective title, but was for a matter

altogether extraneous to the title and under customs regulations, and there being no warranty of quality the bank would not be liable in law to the transferee of the bill of lading for the results of the seizure by the customs. Statement.

6. It is submitted that upon the evidence the findings of the jury are entirely unwarranted, and that there is no evidence to support any of the findings of the jury. All the plaintiffs' evidence clearly shews that they purchased the turpentine from the Ontario Supply Company, that the Ontario Supply Company through the bank purchased the turpentine from Anderson & Harper, and that the bank's sole dealing was as holders of the bill of lading as collateral security for a draft discounted by the bank for Anderson & Harper to transfer the bill of lading, and to receive sufficient of the proceeds to pay their claim, and that this being the position of the bank, they are not liable in law.

7. It is submitted that the learned trial Judge had no power to refuse the first return made by the jury to the questions of the trial Judge.

8. It is submitted that the proceeding of the trial Judge was unwarranted and contrary to legal proceedings, and that the answers returned by the jury in the first instance are the only answers that can be taken, and that the trial Judge had no jurisdiction, right, or authority to discuss the first answers, point out how they might affect the plaintiffs or the defendants, and then with new light send the jury back.

9. The said findings of the jury are contrary to the evidence and the weight of evidence.

September 5, 1890. The motion was argued before BOYD, C., and ROBERTSON, J.

Bain, Q.C., for the defendants the Imperial Bank. The jury should not have been sent back to answer the third question over again. The contention of the bank is that they transferred only such interest as they had as pledgees under the bill of lading, according to the Bank Act, R. S.

Argument.

C. ch. 120. The evidence establishes the manner in which the bank held the goods. They did not sell at all; or if they did they sold only their interest as pledgees, and they did not warrant their title to the goods. There is no evidence to support the findings of the jury. The bank were simply the holders of a bill of lading attached to a draft drawn upon Anderson & Harper, the purchasers of the goods. All the bank did was to transfer the bill of lading, held by them as security for the amount advanced. If there was a purchase by the plaintiffs at all, it was from the Supply Company, not from the bank. If the bank had been selling the goods they would have made title by delivering possession. A sale under a bill of lading does not warrant the title to the goods sold, where all parties know they are so sold: sec. 53 of the Bank Act, R. S. C. ch. 120; Benjamin on Sales, 4th ed., p. 635; *Raphael v. Burk*, Cab. & El. 325. Where the vendor is not in possession there is no warranty of title. The goods were in Quebec, and the presumption is that there was no warranty. *Sewell v. Burdick*, 10 App. Cas. 74, collects the cases up to 1884, and shews that no liability is assumed by reason of the transfer of the bill of lading. I also refer to *Morley v. Attenborough*, 3 Ex. 500.

Osler, Q. C., and *A. McLean Macdonell*, for the plaintiffs. The Judge had the right to send the jury back: *McNeely v. McWilliams*, 13 A. R. at p. 336; Thornton on Juries, ed. of 1888, sec. 375. The question as to selling under the bill of lading is the only point of law. By sec. 55 of the Bank Act, the bank may sell the goods. Sec. 58 requires notice to be given, but that notice is for the purpose of cutting out the right to redeem. The only power the bank had was to sell the goods; they had no power to transfer their interest under the bill of lading. The position of the pledgee selling the goods of the pledgor is defined in Colebrooke on Collateral Securities, sec. 125; *Lewis v. Mott*, 36 N. Y. 395. The effect of sec. 5, subsec. 1, and sec. 15 of R. S. O. ch. 122, is to enable the property in goods to be passed by indorsement of the bill of

lading. An offer to sell generally means to sell as owner : *Argument.* Benjamin on Sales, Am. ed. of 1888, sec. 631. It is argued that the goods being elsewhere, there was no power to sell ; on this point we refer to *Chapman v. Speller*, 14 Q. R. 621 ; *Eichholz v. Bannister*, 17 C. B. N. S. 708 ; Benjamin on Sales, 4th ed., p. 635.

Bain, in reply. R. S. O. ch. 122 does not apply to this or any bank. The main question is whether there was any warranty. The bank could have nothing but a special interest ; a bank cannot own goods ; if they sell, they can sell only the interest they have ; if they had purchased it for the purpose of dealing with it, they would have done an illegal thing.

December 11, 1890. BOYD, C. :—

The evidence for the plaintiffs shews that they bought twenty-five barrels of turpentine through the Ontario Supply Company from the Imperial Bank at fifty-three cents a gallon. The stuff was in bond at Quebec, but the plaintiffs were to have it delivered, duty paid and freight paid to Toronto. This full price was paid by cheque, and the plaintiffs received the bill of lading held by the bank for the goods, which the bank indorsed directly to the plaintiffs. Owing to a seizure and forfeiture by government, (apparently because of some impurity in the quality, in contravention of the customs regulations) the plaintiffs never obtained the turpentine, and now sue the bank in order to recover what was paid.

I take it that we cannot disturb the findings of the jury as to the transaction being as affirmed on behalf of the plaintiffs. The evidence given is sufficient, if credible, to warrant this result. It remains, therefore, to consider whether the dealing of the bank was merely a transfer of its interest in the goods or a sale of the goods on which warranty would arise. The dealing, as described for the plaintiffs, was a sale of the particular article at so much per gallon ; and unless the fact that the bank were selling as pledgees

Judgment. to the knowledge of the plaintiffs, makes a difference, the usual rule in sale of chattels should apply. The bank's contention at the trial was that the owners of the stuff, Anderson & Harper, were the real vendors, and that the bank simply transferred the bill of lading, and so were not liable. The bank sold for a trifle less than the amount advanced on the security of the turpentine; and though no evidence is given of any notice of sale, the evidence of Mr. Rice, shewing communication with the original owners as to the price, would operate as a sufficient consent on their part to satisfy the statute: (Bank Act, R. S. C. ch. 120, sec. 58). The bank used this evidence with the jury to shew that the sale was by the original owners, but while the jury negatives that, it still avails for the other purpose. The result then is that a complete sale of the goods is effected by the bank, which extinguishes the owner's right of redemption. This manner of dealing operates conclusively to shew that there was not merely a transfer of the bill of lading as a redeemable instrument, but as one which had become absolute by the exercise of the power of sale upon default.

Boyd, C.

The jury have believed that what was bought was so much turpentine, and not the right of the bank under the bill of lading, and this finding implies some warranty of title. Failing to get what was bought, there has been a complete failure of consideration, so far as the plaintiffs are concerned. This was the way in which the case was presented by the evidence—viz: that a sale of the goods had taken place; the intention was to sell the goods by the bank on the one hand; and on the other the intention was to buy the goods. The bank contended that the original owner sold, but the jury have found virtually that the sale was by the bank with the concurrence of that owner.

The case is not identical with *Morley v. Attenborough*, 3 Ex. 500, though very close to it. I think that here the intention of both parties as found by the jury serves to distinguish this case—brings it within the range of the opinion of Willes, J., in *Baguley v. Hawley*, L. R. 2 C. P. 625, (in which

he was no doubt the dissentient Judge) and gives a basis of decision which commends itself as most reasonable—that the man who pays for a certain thing and does not get it should succeed as upon a failure of consideration in recovering the price from his vendor.

Judgment.

Boyd, C.

This case is also peculiar because of the action of the Crown, as I understand, before the sale. The manner of selling would indicate an implied undertaking that the bank had the right to sell the goods under the bill of lading and statute, which was, however, inoperative because of supervenient forfeiture to the Crown. In this regard, the case may fall within another line of decision, whereby upon the sale of specific goods it is contemplated that they are in such a state as to be capable of being transferred to the purchaser. Upon this the case of *Couturier v. Hastie*, 8 Ex. 40; 9 Ex. 102; 5 H. L. C. 673, in its various stages, is pertinent.

With *Morley v. Attenborough* unreversed, I feel somewhat uncertain as to this head of law. The general doctrine has been completely changed, according to the exposition of individual Judges within less than a generation, so that in 1867 we have Bovill, C.J., saying, "I consider the general rule to be that upon the sale of goods there is no warranty of title implied by law:" L. R. 2 C. P. at p. 628; and in 1884 Stephen, J., is of opinion the law usually presumes a warranty of title on sale of chattels, and particularly in the case of executory sales of personal property: *Raphael v. Burt*, Cab. & El. at p. 331. In the absence of decision on the part of the Court of highest resort, there will be fluctuations of opinion as to particular cases, but, so far as I can see, the inclination is to undermine the foundation on which *Morley v. Attenborough* rests as an authority, and to multiply exceptions even as against that case.

Not without hesitation therefore, do I conclude that the judgment should be affirmed.

Since writing the above I have consulted the book of Judge Chalmers "The Sale of Goods," which has come to this country pending our deliberation in this case. He

Judgment. refers to *Bagueley v. Hawley*, at p. 45, and notes it as of doubtful authority. At p. 17 he states the general rule (after Benjamin) thus: "By a contract of sale the seller impliedly warrants his right to sell the goods, unless the circumstances of the sale or agreement to sell are such as to shew that the seller is transferring only such property as he may have in the goods."

Boyd, C.

At p. 18 he says, "There is probably an implied warranty on the part of the seller that the goods are free from any charge or lien thereon at time of sale, but there appears to be no English decision in point." He then cites from Pothier and the Scotch law on this head. And on the same page he writes, "The cases in which an implied warranty of title has been negatived appear all to have arisen out of sales by sheriffs or forced sales by public auction where the circumstances were such as to indicate that the seller was only selling such right as he might have in the goods."

My conclusion is rather strengthened than otherwise by this last treatise on the law of sale.

ROBERTSON, J.—(after stating the facts as above):—

As to the seventh and eighth grounds, I think on the authority of *McNeeley v. McWilliams*, 13 A. R. 324, the learned Judge at the trial was clearly within his right and duty, to do what it appears was done on the occasion in question, if he deemed it necessary, in order that there might not be an inconsistency apparent on the face of the answers, which would evidently be the case if the jury had been allowed to go without an explanation or affording them an opportunity of reconsidering the third question.

Then as to the main point in the case, viz., was the transaction such an one as, from the circumstances surrounding it, the bank must be held to have warranted the title in the goods sold? The question is not free from difficulty. I have not been able to find a case exactly in point, although the books are replete with decisions which

in some degree touch upon and elucidate the subject; and Judgment. what has heretofore been considered the old rule is now Robertson, J. held to be substantially altered.

In *Morley v. Attenborough*, 3 Ex. 500, it was held that there is no implied warranty of title in the contract of sale of a personal chattel; and in the absence of fraud, a vendor is not liable for a defect of title, unless there be an express warranty, or an equivalent to it, by declaration or conduct. Also, that a warranty may be inferred from usage of trade, or from the nature of the trade being such as to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys, as against all persons. And *Chapman v. Speller*, 14 Q. B. 621, and *Hall v. Conder*, 2 C. B. N. S. 22, were decided on the same principle, and the conduct of the vendor expressed that the sale was a sale of such title only as the vendor had.

In *Sims v. Marryat*, 17 Q. B. 281, Lord Campbell remarked upon the judgment of Mr. Baron Parke in *Morley v. Attenborough* that "It may be that the learned Baron is correct in saying that, on a sale of personal property, the maxim of *caveat emptor* does by the law of England apply; but if so there are many exceptions stated in the judgment which well nigh eat up the rule." And in *Eichholz v. Bannister*, 34 L. J. C. P. 105, Erle, C. J., referring to the same judgment, said that the rule in the case upon which the Court was then adjudicating, was taken on the ground that in point of law, "a vendor of personal chattels does not enter into a warranty of title, but that the purchaser takes them at his peril, and the rule of *caveat emptor* applies;" but his lordship goes on to say, "I decide (this case) in accordance with the current of authorities, that if the vendor of a chattel at the time of the sale either by words affirm that he is the owner, or by his conduct gives the purchaser to understand that he is such owner, then it forms part of the contract, and if it turns out that in fact he is not the owner the consideration fails, and the money so paid by the purchaser can be

Judgment. recovered back." And Byles, J., in the same case said :
Robertson, J. "It has been stated over and over again that the mere sale of chattels does not involve a warranty of title, but certainly such statement stands on barren ground, and is not supported by one single decision, and it is subject to this exception, that if the vendor by his acts or by surrounding circumstances affirm the goods to be his, then he does warrant the title."

The conclusion that I have come to, after considering these and other cases, is that the law at the present day is that in all ordinary sales of goods the vendor, by exercising the highest act of dominion over the article, in offering it for sale, thereby leads the purchaser to believe that he is the owner; but this applies, it appears to me, only to ordinary cases, and not to a case where the vendor is acting in any special character, such as a mortgagee or pledgee, or sale by the sheriff under execution, &c., and where the vendor does not by word, act, or deed, give the purchaser to understand that he is selling the goods, and not his interest merely, or his title thereto. It may be that I have put the rule too broadly in the foregoing; and that the weight of authority is against it exactly in the terms put; but I think it beyond doubt that it cannot be extended beyond what I have stated.

Judge Chalmers, in his book on "Sale of Goods," lately published, at p. 17 states the rule in these words: "By a contract of sale the seller impliedly warrants his right to sell the goods, unless the circumstances of the sale or agreement to sell are such as to shew that the seller is transferring only such property as he may have in the goods." And he refers to the cases already mentioned by me, and to Benjamin on Sales, and then states the law as laid down by Parke, B., in *Morley v. Attenborough*; and the remark of Lord Campbell, in *Sims v. Marryat*: "The exceptions have well nigh eaten up the rule"; and Mr. Benjamin, after reviewing the whole of the cases, argues conclusively, that the true rule is that stated by him, (Chalmers) in the text.

It therefore remains to be considered what are "the ^{Judgmen} facts and circumstances" which surround the transactions ^{Robertson, J.} in question, and in considering those, I may deal with the objection taken by Mr. Bain as counsel for the bank, that the findings of the jury are contrary to the evidence, &c. In referring to the question of title and the evidence in regard thereto, the learned Judge charged the jury in these words :

"Then, 'Did the sellers profess to sell with a good title or did they not?' The law with regard to that is this, that a person who sells goods to another is taken to have sold them with the assertion that he was the owner of them, and had a good title to them, unless there is something in the surrounding circumstances to lead you to the belief that there was no such representation and no intention of making it. In other words, the man who sells is supposed to warrant he has a good title unless you can conclude from the circumstances of the case that both parties understood that he was merely selling the title he had, and was not warranting himself to have a good title ; and it is urged here that the bank were only, as it were, mortgagees of the goods ; that they were not supposed to be owners of them ; and that the plaintiffs must have known that, and so must have known that they were only getting such a title as the bank had. In the case of persons who hold documents of title of this kind, whether they are a bank or whether they are not, if the stuff is pledged to them on bills of lading of this kind, then when default is made the persons who hold the bills of lading have the right to dispose of the goods which are pledged to them for the purpose of securing the payment of the bill ; and there is nothing in the fact that these defendants were a bank, and that they held this bill of lading as collateral security, to raise the presumption, so far as I can direct you, that they were not professing to have a good title to the goods at the time they sold."

The jury answered that question in the affirmative, and I think the evidence warranted the finding ; and I think

Judgment. the learned Judge properly explained the law affecting the question. There can be no doubt that the plaintiffs were negotiating for, and understood they were buying, twenty-five barrels of turpentine at fifty-three cents per gallon; it was not that they were only to get whatever interest the bank might have in the stuff; it was the stuff itself that they intended to purchase and nothing less. And according to the verbal testimony, the stuff was to be delivered to the plaintiffs at Toronto, freight and charges paid, although the indorsement on the bill of lading says: "Upon payment of freight and charges from Quebec;" and I have no doubt the manager of the bank understood the transaction in the same way—he intended to sell the turpentine, not the interest of the bank in it, but the stuff itself. Now this being the case, it comes within the rule referred to. The claim of ownership is demonstrated by the fact of exercising the highest act of dominion over the goods which he proposes to sell.

It is said that in America the distinction between goods in possession of the vendor, and those not in possession, so decisively repudiated by Buller, J., in *Pasley v. Freeman*, 3 T. R. at p. 58, and by the Judges in *Eichholz v. Bannister*, 17 C. B. N. S. 708, is fully upheld—the rule there being that when the goods sold are in possession of the vendor, there is an implied warranty; but where they are in the possession of a third party at the time of the sale, there is nothing of the kind, and the buyer purchases at his own risk. But I find that this possession must be taken in its broadest sense, and as including possession by a bailee of the vendor. The excepted cases must be substantially cases of sales of the mere naked interest of persons having no possession, actual or constructive, and in such cases no warranty of title is implied; as to which see *Whitney v. Heywood*, 6 Cush. 82; *Shattuck v. Green*, 104 Mass. 42; and in the latter case Morton J., makes use of these words: "The possession of an agent or of a tenant in common, holding the goods for the vendor and as his property, and not adversely, is the constructive possession

of the vendor ; and if he sells goods thus held as his, a Judgment.
warranty of title is implied."

Robertson, J.

Now to apply this, we have the turpentine held by a bailee of the vendor subject to the order of the vendor ; the vendor, therefore, had constructive possession of the turpentine, and having such possession, a warranty of title is implied.

It is also contended that the bank could only deal with the turpentine under the provisions of the Bank Act, and that even if the bank did sell as found by the jury, that would not make the bank liable. I cannot assent to such a proposition. It is true the bank is authorized under the Bank Act to do certain things, and if they exceed their powers in that respect, such excess would be illegal ; but exercising an excess of authority cannot be pleaded as a defence by the party who thus acts illegally ; in other words, he cannot take advantage of his own wrong. Moreover the 55th section of the Bank Act, in the event of non-payment at maturity of any debt secured by a bill of lading, expressly authorizes the bank "to sell the goods," not to transfer its security, but "to sell the goods ;" and it was in the exercise of such authority that the bank sold the stuff in question.

Then again counsel contended that the written contract must be looked at to see what the contract to sell was, and by that written contract, it is argued, it is clear in law that the bank was not bound to deliver possession, and that they did not warrant title. This contention cannot be allowed to prevail either. The parties did not put their contract in writing ; the contract was by parol, and according to the evidence the stuff was to be delivered to the purchasers in Toronto, free of all charges. The indorsement on the bill of lading does not set out or purport to set out the contract of sale, and the fact that the manager of the bank delivered the bill of lading with such indorsement, either as a muniment of title, or as a symbolical delivery, or as an incident of the transaction, does not

Judgment. prevent the bank from being liable upon the implied Robertson, J. warranty of title.

On the whole, therefore, I am of opinion that the order for judgment must be affirmed with costs.

G. A. B.

[QUEEN'S BENCH DIVISION.]

CARTER V. STONE ET AL.

Assignments and preferences—Assignment for benefit of creditors—Priority over executions—Purchase money of land sold under mortgage—R.S.O. ch. 124, sec. 9.

Where, after a sale of mortgaged premises in an action for that purpose, the mortgagor made an assignment for the benefit of his creditors under R. S. O. ch. 124, before certain prior execution creditors had established their claims in the Master's Office to the balance of purchase money, after satisfying the amount of the mortgage :—
Held, that the assignee for creditors was entitled to such balance freed from any liability to satisfy the executions out of it.

Statement. ON 8th April, 1890, the plaintiff obtained a judgment for the sale by the Court of certain lands in the city of Toronto, to realize the amount of a mortgage upon them and a judgment against the defendant Richard Stone, the owner of the equity of redemption. The defendants Glanville and Muffitt on 24th April, 1890, were made parties in the office of the official referee as subsequent incumbrancers by judgment and execution, and by the notice served on them they were directed to appear in the referee's office on the 19th of May, 1890, to prove their claim.

Pending the return of this notice the plaintiff proceeded to a sale of the property on the 17th May, and the defendant John Glanville became the purchaser at the price of \$4,875, payable as follows, ten per cent. down and the balance in thirty days thereafter into Court, without interest. The report on sale was dated 19th May, 1890.

On the 9th June, 1890, the defendant Stone made an assignment for the benefit of his creditors to Richard Schultz. Statement.

On 30th June, 1890, the plaintiff obtained an order upon consent dispensing with the payment into Court of \$4,014 of the purchase money, being the amount of his claim, and ordering the purchaser to pay the residue only of his purchase money into Court. The purchaser paid into Court \$487.50 on account of this residue, leaving a balance of \$373.09 and interest still unpaid.

On the 16th October, 1890, MACMAHON, J., sitting in Chambers, made an order upon the application of Schultz, the assignee of Stone, that the money in Court and the balance due by Glanville should be paid over to Schultz for distribution among the creditors of Stone.

From this order the defendants Glanville and Muffitt now appealed by motion to the Divisional Court, claiming that under their execution in the sheriff's hands in respect of which they were made defendants in the referee's office, and upon which some \$1,800 was due, they were entitled to the surplus.

The motion was argued before the Divisional Court (ARMOUR, C. J., and STREET, J.) on 18th November, 1890.

E. T. Malone, for the execution creditors.

James Reeve, Q.C., for the assignee.

The following authorities were referred to:—*Vesey v. Elwood*, 3 Dr. & War. 74; *Harvey v. McNeil*, 12 P. R. 362; *Clarkson v. Severs*, 17 O. R. 592; *Wood v. Joselin*, 18 A. R. 59; *Sinclair v. McDougall*, 29 U. C. R. 388; *Ryan v. Clarkson*, 16 A. R. 311; 17 S. C. R. 251; *Davies v. Smith*, 10 P. R. 627.

December 31, 1890. The judgment of the Court was delivered by

STREET, J.:—

The clause governing the question raised by this motion is sec. 9 of ch. 124, R. S. O., which is as follows:

Judgment.
Street, J.

"An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs who has the first execution in the sheriff's hands."

In *Clarkson v. Severs*, 17 O. R. 592, it was held by the Chancery Divisional Court that an assignment by an execution debtor was too late to intercept money which had reached the hands of the sheriff, but had not been paid over to the execution creditor, because the execution was then satisfied, and because no rights remained in the debtor upon which the assignment could operate. I have been unable to see, however, that any equivalent state of facts exists in the present case.

It is perhaps immaterial, but it is worthy of remark, that the sale which took place here must have taken place by consent of all parties; otherwise it was plainly irregular in a mortgage action to sell the property before the accounts of the plaintiff and of the incumbrancers had been taken, and a day given for redemption.

Whether by consent or not, however, what took place when the Court sold, having before it all the parties interested in the property, was, for the purposes of the present dispute, equivalent to a contract entered into by all parties with Glanville for the sale of the property to him upon a month's credit, one of the terms being that the purchase money should be paid to a third person to be distributed according to the claims they should respectively establish to it.

Then before the purchase money fell due, and before any of the parties had established their claims to it, the owner of the equity of redemption, being also the execution debtor, made an assignment for the benefit of his creditors. At that time he had no longer an equity of redemption, because he had parted with it by entering into the contract to sell, but he was entitled to his lien upon it for the pur-

chase money, subject to the mortgage and executions. Judgment.
This being the state of the case, the statute operates by Street, J.
giving to the assignee precedence as to the purchase money
over the executions; in other words, the right to receive
the purchase money passed to him discharged by the
statute of any liability to satisfy the executions out of it.

The result of our judgment may be that the plaintiff's
judgment and execution may also be found to be subject to
the assignment. At all events it appears that he had an
execution in the sheriff's hands prior to that of Glanville
and Muffitt, and they are therefore not entitled to a lien for
their costs.

The motion should be dismissed with costs, and it is so
ordered.

[CHANCERY DIVISION.]

SMITH V. BENTON.

Contract—Canada Temperance Act—Sale of liquors for use in county where Act in force—Avoidance of contract—Repeal of Act—Effect of on contract.

In an action for the price of liquors supplied with the knowledge that they were for use in a county in which the Canada Temperance Act was in force, part of which were sold prior to a vote for the repeal of the Act, and the remainder subsequent to a successful vote for its repeal, but before the Order in Council bringing the Act into force had been revoked :—

Held, that the price of the liquors sold before were not, but that of those sold after the successful vote were recoverable.

Pearce v. Brooks, L. R. 1 Ex. 217, followed.

Statement.

THIS was an action brought to recover the price of certain liquors sold.

The principal defence set up was, that the liquors were sold for use and consumption in a county where the Canada Temperance Act, R. S. C. ch. 106, was in force.

The action was tried at Chatham, on November 27th, 1890, before BOYD, C.

Charles Macdonald, for the plaintiff.

N. Mills, for the defendant.

It appeared at the trial that part of the liquors were sold while the Canada Temperance Act was in force, and part after the vote had been taken for the repeal of the Act, which was in favour of the repeal, but before the revocation order in council bringing the Act into force had issued.

December 5, 1890. BOYD, C. :—

The plaintiff, a wholesale liquor merchant, licensed to sell in London, sold spirituous liquors to the defendant, carrying on a place of public entertainment at Ridgetown, in the county of Kent, during a period while the Canada Temperance Act was in force in the latter municipality.

At the argument, I was impressed with the view that the contract being valid in the county of Middlesex, a right of action for the price arose, notwithstanding that the liquors were sent for consumption to a prohibition county. American decisions would seem to warrant a recovery in cases where liquor is sold legally in one State though for the purpose of being sold illegally in another State. But upon English authority the rule appears to be not to regard the place of contract, if when the sale is made the vendor knows that the commodity is intended to be used for an immoral or illegal purpose.

Judgment.

Boyd, C.

It is laid down as settled law in *Pearce v. Brooks*, L. R. 1 Ex. 217, "that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied."

In *Taylor v. Chester*, L. R. 4 Q. B., 311, Mellor, J., says: "It is well established by *Pearce v. Brooks*, and the cases there cited, that if a person makes a contract with the knowledge that another intends to apply its subject matter to an immoral purpose, he cannot recover upon it." Such knowledge need not be absolute; it is enough if the circumstances shew good reason to believe that the liquor was furnished to supply an illegal traffic. From these circumstances knowledge may be inferred by the jury, or Court of trial, which will implicate the vendor as contributing to the transgression of the law.

This rule of the Court, substantially enunciated in *Pearce v. Brooks*, appears also to be the policy of the Canadian Statutes as expressed in R. S. C. ch. 106 sec. 99 sub-sec. 8 & 9.

But I distinguish between liquors supplied before and after the successful vote on the repeal of the Act. Those sold prior to the popular vote are not to be recovered for, because of what has been said. Those sold after were intended for and were capable of legitimate use in trade. Though it is true that the prohibition is not at an end in due form of law till the revocation of

Judgment. the order in council bringing the Act into force ; still such
Boyd, C. a revocation follows as a natural and inevitable consequence thirty days after the popular vote against the Act: 51 Vic. ch. 35 sec. 9 (D).

The liquors ordered after the vote to revoke were in contemplation of the increased lawful traffic thereafter expected, and the inference from the facts in proof should not be against the legality of the dealings at this point between the parties. As said in *Waugh v. Morris*, L. R. 8 Q. B. 208, in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law.

It may be that the pleadings are technically loose to raise the substantial defences I have dealt with, but I am in possession of all the evidence that could be given, and the parties were well aware of what was really in issue between them.

Upon the question of the liability of the defendant personally as the one who ordered the goods, I gave judgment at the close of the evidence.

Liquors supplied before the day of the repealing vote (8th April, 1889), amounting to \$128.52 should be deducted from the total bill of \$520.86, and judgment should be for the balance without interest but with costs.

G. A. B.

[CHANCERY DIVISION.]

GOULD V. ERSKINE.

*Seduction—Mother as plaintiff in absence of the father from the Province
Locus standi—Common law right of action—Demurrer—R. S. O. 1887,
ch. 58.*

Held, on demurrer to a statement of claim in an action of seduction that the mother of the girl seduced, suing as her mistress, had a sufficient common law right to bring the action, in the absence from the Province of the girl's father,

Held, also, that R. S. O. 1887, ch. 58, "An Act respecting the Action of Seduction," is only an enabling Act enlarging the right to maintain the action, under circumstances which would not be sufficient at common law.

THIS was a demurrer to a statement of claim in an ~~Statement~~ action of seduction brought by the mother of the girl seduced, it being alleged therein that the father was not at the birth of the child or at the commencement of the action a resident of this Province. All that is necessary to this report is stated in the judgment.

The demurrer came on for argument on December 17th, 1890.

Johnston, Q.C., for the demurrer. The action is under R. S. O. 1887, c. 58. It is to be assumed that the father is alive; but it is only in case of the death of the father that the mother can maintain the action under section 1: *L'Esperance v. Duchene*, 7 U. C. R. 148, 154-5. The character of mother and mistress cannot be separated; it is as mother only and not as mistress she sues. An allegation not necessary does not make it good: *Lake v. Beemiss*, 4 C. P. 430; *Kelly v. Bull*, 23 U. C. R. 278. If this action is right, two actions might be brought, one by the father, and one by the mother.

Hilton and *McCulloch*, contra. This action is not brought under the statute, but under the common law right as mistress: *Smith's Master and Servant*, 4th ed., p. 175. The statute does not limit the action to the father.

Judgment. *Kelly v. Bull*, is in our favour. There is no allegation Robertson, J. either in the claim or the defence that the father is alive.

January 2nd, 1891. ROBERTSON, J. :—

This is an action of seduction brought by the mother—the father of the girl seduced not being a resident of Ontario—either at the time of the birth of the child, or at the commencement of this action.

The allegations in the statement of claim are, that the plaintiff carries on the business of a farmer, and that Martha Ann Gould—the girl seduced—is the daughter and servant of the plaintiff, and at the time of the seduction, and up to the time of the birth of the child, assisted her, the plaintiff, in the conduct of her said business, and in the management of her household affairs. That the said Martha in or about the months of October and November, 1889, was seduced by the defendant, whereby she became pregnant, and on 15th July, 1890, was delivered of a child, and in consequence of said seduction the plaintiff was deprived of the services of the said Martha for a long time, and incurred \$20 expense in nursing and taking care of her, and about the delivery of said child.

The defendant demurs on the grounds that the plaintiff has no right of action whatever, which, if any, is in the father; and also that it is not shewn that at the time of the alleged act complained of, the plaintiff's husband was residing without the Province of Ontario.

The plaintiff does not sue under our statute, although the learned counsel supporting the demurrer, argued that she does. The plaintiff's counsel contends that she is suing at common law; and the conclusion I have come to is, that if she can maintain the action at common law she is entitled to do so. The allegations are, that the plaintiff is engaged in the business of a farmer, and that Martha Ann Gould, who is her daughter, is, or was, at the said times, when, &c., also *her servant*, and that she, as such servant, assisted the

plaintiff in the conduct of her said business, and in the management of her household affairs; and that by reason of the seduction the plaintiff was deprived of such services, &c. Judgment.
Robertson, J.

The plaintiff describing Martha as her servant is sufficient, although she is also described as being the daughter of the plaintiff. As the mistress of Martha, in the absence from the province of her father, she has a common law right to bring the action, and it is not necessary for her to show that she has more than that common law right. It may be that the father of the girl is dead. If he is not, it is for the defendant to set that up as a defence; and the unnecessary allegation that the father was not at the birth of the child, or at the commencement of the action, a resident of this province, cannot be construed, under the circumstances, that he is still living.

The gist of the action is loss of service, and is maintainable by any one who has suffered that loss. If the action was brought under our statute, the loss of service is presumed and proof to the contrary, will not be allowed, but the statute does not interfere with the common law rights, it is in fact only an enabling act, enlarging, as it were, the right to maintain the action, under circumstances which would not be sufficient at common law.

In *Tweedlie v. Bogie*, 27 C. P. 561, the action was brought by the brother, it being alleged in the declaration that the girl seduced was the sister and servant of the plaintiff, whereby, &c. The plea was, that at the time of the child's birth the girl's father was dead, and that her mother was then and still is alive, and at the commencement of the action was and still is a resident of the Province, and that the girl was her legitimate daughter. Held, on demurrer, the plea was bad, and the declaration good, for it shewed a common law right in the plaintiff, to maintain the action; and the plea did not shew enough to divest it under the statute in favour of the mother. If therefore, the brother, as master, can maintain the action in the life time of the mother, the father being dead, I cannot see why the mother, as the

Judgment. mistress of the girl, cannot *qua* mistress, maintain this
Robertson, J. action in the absence from the Province of the father. See
also *Fores v. Wilson*, 1 Peake 55.

The want of an allegation that at the time of the seduction, the father was residing without the Province, does not help the defendant. If that affords any defence, it is open to the defendant to raise it by a plea. See as to this *Tweedlie v. Bogie*, already referred to.

On the whole I think the plaintiff is entitled to judgment, overruling the demurrer with costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

HYATT V. MILLS.

Crown lands—Crown patent—Construction—Land described as “north part” of lot—Uncertainty—Tax sale—Adverse occupation—R. S. O. ch. 193, sec. 191.

A patent of land from the Crown is to be upheld rather than avoided and to be construed most favourably for the grantee.

Where land was granted by a Crown patent describing it as the north part of lot 13, containing sixty acres, and the original plan of the township shewed the lot with centre line running through the concession and shewed the part south of the line as one hundred acres, and the part north of the line as eighty acres, and it appeared that, prior to the grant of the north part, there had been a grant of the southerly part, containing one hundred acres, describing it by metes and bounds, which were evidently intended to include all the land south of the line, although they actually fell short of doing so :—

Held, in a contest between the plaintiff claiming under the patentee of the north part and the defendant claiming under sales for taxes based upon the lands sold being patented lands, that the patent was not void for uncertainty, but that under the words “the north part” the whole of the lot lying to the north of the centre line passed to the grantee and those claiming through him.

Doe Devine v. Wilson, 10 Moo. P. C. 502; *Nolan v. Fox*, 15 C. P. 565; *Regina v. Bishop of Huron*, 8 C. P. 253, specially referred to.

At the time of the conveyances to the plaintiff's predecessor in title and to himself, the defendant was in adverse occupation of lands sold for arrears of taxes, having a *bonâ fide* claim or right thereto, derived mediately under the sales for taxes :—

Held, that, although the sales may have been invalid, sec. 191 of R. S. O. ch. 193 applied to them, and the conveyances, as regards the lands sold for taxes, were void; and want of knowledge of the adverse occupation, on the part of the plaintiff and his predecessor, could not alter their effect.

THIS was an action to recover possession of land, tried *Statement.* before STREET, J., at the Spring sittings, 1890, of this Court at Chatham.

The plaintiff claimed title by grant from the Crown to John D. Sullivan, dated the 4th day of December, 1860, of “all that parcel or tract of land situate, lying, and being in the township of Romney in the county of Kent, containing by admeasurement sixty acres, be the same more or less, which said parcel or tract of land may be otherwise known as follows, that is to say, being composed of the north part of lot number thirteen in the fifth concession of the aforesaid township of Romney;” by deed

Statement. from John D. Sullivan and wife, for the purpose of barring dower, to Louis A. Gignac, dated the 19th May, 1886, of "all and singular that certain parcel or tract of land and premises situate, lying, and being in the county of Kent and Province of Ontario, and being composed of the north part of lot number thirteen in the fifth concession of the township of Romney, containing sixty acres of land, be the same more or less;" and by deed from Louis A. Gignac to the plaintiff, dated the 3rd day of August, 1887, of "all and singular that certain parcel or tract of land," describing it as in the deed from Sullivan to Gignac, above referred to.

The defendant claimed title by the deed of the warden and treasurer of the county of Kent to John Smith, of "all that certain parcel or tract of land and premises,"—being composed of fifty acres of the north part of lot number thirteen in the fifth concession of the township of Romney, in the said county, which said fifty acres may be known and described as follows—that is to say, commencing at the north east angle of said north part, at the limit between said north part of lot number thirteen and lot number fourteen; thence along said limit, taking a proportion of the width corresponding in quantity with the proportion of the said north part of lot number thirteen, in regard to its length and breadth sufficient to make fifty acres of land," to pay the arrears of taxes alleged to be due on the north part of lot number thirteen in the fifth concession of the township of Romney, sixty acres; which deed was dated the 30th November, 1869; and by the deed of the warden and treasurer of the county of Kent to John Smith, of "all that certain parcel or tract of land and premises, being composed of ten acres of the southerly part of north half lot number thirteen in the fifth concession of the township of Romney, in the said county, which said ten acres may be known and described as follows—that is to say, the whole of said southerly part of the north half of said lot number thirteen in the fifth concession, containing ten acres, and being part not sold for

taxes in 1868," to pay the arrears of taxes alleged to be Statement.
due on the southerly part of the north half of lot number thirteen in the fifth concession of the township of Romney, containing ten acres, being part not sold for taxes in 1868; which deed was dated the 26th November, 1872; and by deed from John Smith to the defendant, dated 17th February, 1881, of "all and singular that certain parcel or tract of land and premises situate, lying, and being in the township of Romney, in the county of Kent and Province of Ontario, being composed of the north half of lot number thirteen in the fifth concession of said township, containing by admeasurement sixty acres." And the defendant also claimed title by length of possession.

The learned Judge held the patent from the Crown to be void for uncertainty, and dismissed the plaintiff's action with costs.

At the Easter Sittings of the Divisional Court, 1890, the plaintiff moved to set aside this judgment and enter judgment for him, and also asked leave to file the affidavit of Aubrey White, the deputy commissioner of Crown Lands, to the effect that the plan by which Crown patents in Romney were granted was one made by one Burwell, a Provincial land surveyor, in or about the year 1821, and that lot thirteen in the fifth concession of Romney was shewn thereon to contain 180 acres; that only two Crown patents had issued of the said lot, one to Isaac Taylor, and the other to John D. Sullivan, the former being intended to convey the southerly one hundred acres of the lot and the latter the residue of the said lot; that the Crown now claimed no part of the said lot; and that John D. Sullivan was the original locatee of the Crown of the north half of the said lot.

The motion was argued before ARMOUR, C. J., and FALCONBRIDGE, J., on the 6th June, 1890.

Douglas, Q. C., for the plaintiff. I contend the sales for taxes are void. As to the question whether title can be

Argument. made upon the description in the patent, it is to be remarked that the southerly part was granted by metes and bounds before the grant of the northerly part. I submit that the use of the words "north part" shews that the Crown was dividing the lot into two parts, and that "north part" is equivalent to "north half." Even if the Judge was right as to the north fifty acres, we are entitled to the remaining thirty-five acres, or at least to twenty-five acres.

Moss, Q. C., on the same side. The objection to the description is not open to the defendant upon his pleading. The points the parties really came down to try were the title of the plaintiff, the possession of the defendant, and the validity of the tax sales. The affidavit of Aubrey White shews clearly what was intended to be granted. I refer to *McCracken v. Warnock*, 43 U. C. R. 214. Both the tax sales were bad; the mode of advertizing and the mode of selling were not according to the statute.

Matthew Wilson, Q. C., for the defendant. Under 32 H. VIII. ch. 9, the plaintiff's deed proved no title, as the defendant was in possession: sec. 191 of R. S. O. ch. 193, the Assessment Act; *Beasley v. Cahill*, 2 U. C. R. 320; *Doe Simpson v. Molloy*, 6 U. C. R. 302; *Doe Clark v. McInnis*, *ib.* 298; *Bishop of Toronto v. Cantwell*, 12 C. P. 607; *Ross v. Meyers*, 9 U. C. R. 284. These were decisions under the statute; but the Court of Chancery laid it down concurrently that they would not favour the bringing of actions by speculative purchasers: *Wigle v. Settingington*, 19 Gr. 512; *Little v. Hawkins*, *ib.* 267. The deeds to Gignac and Hyatt were after action, and should not be admitted: *Brand v. Todd*, Noy 29. The tax deed of 26th November, 1872, conveyed all of the north part of the lot which had not already been sold for taxes.

Douglas, in reply. As to the statute of H. VIII., there is no evidence that the plaintiff knew the defendant was in possession, so the statute does not now apply. I refer to *Kennedy v. Lyell*, 15 Q. B. D. 491; Sugden on Vendors and Purchasers, 14th ed., p. 356, note *h*. As to description, I refer to *Attrill v. Platt*, 10 S. C. R. at p. 472.

December 31, 1890. The judgment of the Court was Judgment.
delivered by Armour, C.J.

ARMOUR, C. J. :—

If we were of opinion that upon the evidence before us the patent from the Crown was void for uncertainty, we would not so hold without first having brought before us all the documentary evidence to be had in the Crown Land Department relating to it, in order that evidence might be had, if such there should be, upon which we might be enabled to uphold its validity.

But we think that the evidence adduced at the trial was sufficient to uphold the patent from the Crown, and to enable us to say that upon the proper construction of it the whole of the north part of the lot, that is, the whole of the lot lying north of the centre of the concession, passed to the grantee.

In *Clark v. Bonnycastle*, 3 O. S. 528, it is said that grants from the Crown must generally be construed most favourably for the Crown: "But there are several exceptions to this rule. One of these is, that the construction shall be in favour of the grantee, when the grant is made for a valuable consideration, or when it is made *ex speciali gratia, certa scientia, et mero motu regis*."

In *Doe Devine v. Wilson*, 10 Moo. P. C. 502, it is said: "It was argued on both sides of the argument that when a Crown grant refers with certainty, though *in pais* only, that reference will be sufficient; and that if by one construction a Crown grant would be avoided, but by another it might be made good, the latter shall be adopted. These propositions are fully established by the following, amongst many other cases: *Priddle and Napper's Case*, 11 Co. Rep. 8; *Whistler's Case*, 10 Co. Rep. 65; *The Earl of Shrewsbury's Case*, 9 Co. Rep. 46 b; *The Earl of Cumberland's Case*, 8 Co. Rep. 166 b; *Stockdale's Case*, 12 Co. Rep. 86; Vin. Abr. Prerogative Grant. Such is the law as to grants of the Crown made *ex certa scientia et mero motu*.

Judgment. It is true that such grants are according to the books construed most favourably for the grantee. It is also true that the grants now in question are not made *ex certa scientia et mero motu*, but for consideration, namely, quit rents, after five years, and a condition in the first grant, that the grantee shall reside on the granted land and proceed to the improvement of it, and that timber fit for the navy is reserved in both. But the principles above stated surely apply to all Crown grants. It should seem, therefore, that if there be such a description in a Crown grant, whether by descriptive words or by reference to a matter *in pais*, or otherwise, as that by evidence connected with such description the identity of the lands granted is capable of being established, the grant may be good, although the description be in itself never so imperfect."

In *Lord v. The Commissioners of Sydney*, 12 Moo. P. C. 473, it is said that "upon a question of the meaning of words, the same rules of common sense and justice must apply, whether the subject matter of construction be a grant from the Crown, or from a subject: it is always a question of intention, to be collected from the language used with reference to the surrounding circumstances."

It was shewn at the trial that the township of Romney was surveyed with double front concessions. A copy of the original plan of the township made by Mr. Burwell, a deputy surveyor, was produced from the Crown Land Department, which shewed lot thirteen in the fifth concession of Romney with a centre line running through the concession, and shewing that part of the lot thirteen to the south of the centre line as of the area of one hundred acres, and that part of the lot thirteen north of the centre line as of the area of eighty acres; the deficiency in that part of lot thirteen north of the centre line being caused by part of it being cut off by the road lying between the counties of Kent and Essex.

A patent from the Crown to Isaac Taylor, dated the 1st November, 1847, was put in of "all that parcel or tract of land, containing by admeasurement one hundred acres, be

the same more or less, being composed of the southerly ^{Judgment.} part of lot number thirteen in the fifth concession of the ^{Armour, C.J.} township of Romney," describing it by metes and bounds. These metes and bounds were evidently intended to include all the land south of the centre line of the said concession, but upon an actual survey they fell somewhat short of doing so.

The words "the southerly part" were used in this patent because it was supposed, no doubt, that the words "southerly half" would not include all the land south of the centre line of the concession, as there were only one hundred and eighty acres in the whole lot. But it was, in our opinion, intended by the use of the words "the southerly part" to include all that part of the lot lying to the south of the centre line of the said concession. And it was, in our opinion, in like manner intended by the use of the words "the north part of lot number thirteen," in the patent to Sullivan, to include all that part of the lot lying to the north of the centre line of the said concession.

This patent is, as we have seen, to be upheld rather than avoided, and to be construed most favourably for the grantee, and so construing it, we think that the words "the north part" mean the whole of the north part, that is, the whole of the lot lying to the north of the centre line of the said concession.

It is to be observed also that there is no contest here between the Crown and those claiming under the patentee, nor between conflicting patents, but both plaintiff and defendant, in a manner, claim under this patent, for the sales for taxes under which the defendant claims were based upon the lands sold being patented lands.

We do not think that in holding as we are doing, we are going beyond what has been held in many other cases, notably in *Doe Devine v. Wilson*, above referred to, and *Nolan v. Fox*, 15 C. P. 565, and *Regina v. Bishop of Huron*, 8 C. P. 253.

Having held as we have done with respect to the land

Judgment. granted by the patent to Sullivan, we are bound to hold
Armour, C. J. that the deeds from Sullivan to Gignac and from Gignac to the plaintiff had the effect of conveying the land granted to Sullivan, to the plaintiff.

The difficulty still in the way of the plaintiff's recovery of the whole of the land arises under the Assessment Act, R. S. O. ch. 193, sec. 191, which provides that "In all cases where lands are sold for arrears of taxes, whether such sale is or is not valid, then so far as regards rights of entry adverse to any *bond fide* claim or right, whether valid or invalid, derived mediately or immediately under such sale, section 9 of the Act respecting the law and transfer of property shall not apply, to the end and intent that in such cases the right or title of persons claiming adversely to any such sale shall not be conveyed where any person is in occupation adversely to such right or title, and that in such cases the common law and sections 2, 4, and 6 of the statute passed in the 32nd year of the reign of King Henry VIII. and chaptered 9, be revived, and the same are and shall continue to be revived."

At the time of the conveyance from Sullivan to Gignac and from Gignac to the plaintiff, the defendant was in occupation of the lands sold for arrears of taxes, having a *bond fide* claim or right thereto, derived mediately under such sales, and was in such occupation adversely to the rights of entry of Sullivan and Gignac, and so such conveyances, as regards the lands so sold for taxes, were void. There is no doubt that these lands were sold for arrears of taxes, and that taxes were in arrear in respect of such lands, and although the sales may have been invalid, the statute applies to them as much as if the sales had been valid.

It was contended that, because neither Gignac nor the plaintiff knew that the defendant was in occupation when they purchased, the statute did not apply, but it was the adverse occupation of the defendant which made void the conveyances, and want of knowledge of such adverse occupation could not alter the effect of the adverse occupation.

Want of knowledge of the adverse occupation would, Judgment.
no doubt, relieve them as buyers from the penalties im- Armour, C.J.
posed on buyers by the statute 32 Henry VIII. ch. 9, but
it would not serve to make the conveyances valid.

In *Underwood v. Courtown*, 2 Sch. & Lefroy 41, at p. 65, Lord Redesdale said: "But a person out of possession cannot in law convey anything to a stranger; he can give only a release to one in possession, and the law has wisely provided this in order to quiet possessions:" *Partridge v. Strange*, Plow. 88; *Doe Williams v. Evans*, 1 C. B. 717; *Bishop of Toronto v. Cantwell*, 12 C. P. 607.

Of what lands then is the defendant to be held to be in occupation under the sales for arrears of taxes? First, of the fifty acres purporting to be conveyed by the deed of the 30th November, 1869, the principle of the location of which adopted by the surveyors called on behalf of the defendant, we hold to be correct for the purpose of this inquiry.

Second, of ten acres, bounded on the north by the southern limit of the fifty acres so located as above, to the south by the centre line of the concession, to the east by the easterly limit of the north part of the said lot, and extending far enough to the west to make ten acres and to be in form rectangular.

It was contended that the deed of the 26th of November, 1872, conveyed all the residue of the north part of the lot not previously sold for taxes, but this contention is wholly untenable.

The assessment was for ten acres only, taxes were in arrear in respect of ten acres only, the warrant to sell was for ten acres only, and the sale was of ten acres only, and this ten acres was in the warrant said to be ten acres of the south east part of the north half; and construing the deed with reference to all this, it is manifest that it did not purport to convey any more than ten acres, and locating this ten acres as the south east part of the north half of the lot in such manner as is best for the owner of the land as provided by the Assessment Act, we have located it as above.

Judgment. The result is that the plaintiff fails as to the fifty acres
Armour, C.J. and as to the ten acres as above located, and is entitled to
recover the whole of the lot north of the centre line of the
concession, except the sixty acres as above located.

The learned Judge rightly decided against the defendant's claim to any part of the land by length of possession, for there was no such possession for the prescribed time as served to extinguish the title of the true owner.

The judgment will be as above indicated, and as both parties have been in a measure successful, there will be no costs to either party of the action or of this motion.

[QUEEN'S BENCH DIVISION.]

ISRAEL v. LEITH.

Easement—Severance of tenement by conveyance—Rights of drainage and aqueduct—Implied grant—Express grant—Notice—Registry laws.

Where the owner of two adjoining lots of land conveys one of them, he impliedly grants all those continuous and apparent easements, including rights of drainage and aqueduct, over the other lot which are necessary for the reasonable use of the property granted, and which are at the time of the grant used by the owner of the entirety for the benefit of the part granted.

The grant of such an easement, if implied, is not within the provisions of the Registry Act, and prevails over a subsequent purchaser, without notice, of the adjoining lot; if express, its due registration on the lot conveyed is notice thereof to a subsequent purchaser of the adjacent lot without registration thereon.

Dicta of PATTERSON, J. A., in *Carter v. Grasett*, 14 A. R. at pp. 709, 710, dissented from.

THIS action was tried before ROSE, J., without a jury, *Statement.* at Hamilton, on the 1st October, 1890.

The facts appear in the judgment.

Bicknell, for the plaintiff.

Bain, Q. C., for the defendant.

November 12, 1890. ROSE, J.:—

From the admissions made at the trial it appeared that one Thomas Bryce owned lot 29, plan 558, O'Hara avenue, formerly in the town of Parkdale, now city of Toronto, and built thereon two semi-detached houses Nos. 116 and 118—the party wall dividing the lot into the north and south halves respectively. The water and sewer pipe service ran from O'Hara avenue along the lane to the south of the lot and across the southerly half of the lot under house No. 116, to the northerly half of the lot into house No. 118.

The water pipe was one foot and the sewer pipe four feet deep in the ground. These pipes formed the only means by which house No. 118 obtained water and drainage at the time of the sale to the plaintiff's grantor.

Judgment.

Rose, J.

Bryce on the 31st December, 1882, sold to one Emily Maddox, a predecessor in title of the plaintiff, the north half of said lot, but the description does not refer to plan 558, which was not registered until September, 1883. The description was by metes and bounds, the point of commencement being established with reference to the north east angle of lot 2, plan 455, which lot, no doubt, lay immediately to the south of lot 29.

The conveyance was "in pursuance of the Act respecting Short Forms of Conveyance," and there was no reference in express terms to any easement.

Bryce having subsequently sub-divided the land on the south of that above conveyed, the south half of the lot in question was included in a plan No. 837 as lot 3, and on the 30th January, 1889, Bryce conveyed lot 3 to the defendant by a deed in pursuance of the said Short Forms Act. The defendant had no actual notice or knowledge of the existence of the pipes, and made no inquiries at the time of making the purchase.

The deed to Maddox was registered on the 7th of June, 1882, and the defendant's on the 31st of January, 1889.

The defendant cut off the pipes and the damage to the plaintiff, as agreed upon, was \$125.

The question is as to the respective rights of the parties.

Apart from the Registry Act and ch. 105, R. S. O., it seems clear that Maddox became entitled to the easements by implied grant. See Goddard on Easements (1884) pp. 96 and 172; *Bayley v. Great Western R. W. Co.*, 26 Ch. D. 434; *Briggs v. Semmens*, 19 O. R. 522, where the learned Chief Justice cites, among other cases, *Worthington v. Gimson*, 2 El. & El. 618, and *Polden v. Bastard*, L. R. 1 Q. B. 156.

It was argued that the easements became the subjects of an express grant by virtue of R. S. O. ch. 105, sec. 4, which provides that every deed drawn pursuant to that Act "unless an exception is specially made therein, shall be held and construed to include all * * easements," &c.

This question was somewhat discussed in *Carter v.*

Grasett, 14 A. R. 685, where Patterson, J. A., and Ferguson, J., held that there was by the force of the above section an express grant of the light there in question; and Burton and Osler, JJ.A., held that there was an implied grant.

Judgment.
Ross, J.

In the view I take of the matter, it is not necessary to come to any decision on the point. Where the easement is one created by the deed, *Ross v. Hunter*, 7 S. C. R. 289, decides that the deed requires registration to preserve the right of enjoyment as against a registered owner of the property on which the easement is claimed. The Act there under consideration was the Registry Act of Nova Scotia, R. S. ch. 79, secs. 9 and 19, and it was further decided that a grant of an easement or servitude is a deed affecting the land to be burdened by it. See judgment of Strong, J., at p. 319.

It seems to me that, whether by the deed of the dominant tenement the easement is granted expressly by virtue of sec. 4 of ch. 105, or by implication only, it is clearly an "instrument affecting the lands" to be burdened by it within the meaning of sec. 76, ch. 114, R. S. O., "The Registry Act." Along with the grant, by virtue of it, comes the right to use the land of another—to enjoy an easement which burdens, *i. e.*, affects, such land. I am quite unable to give the language of such section its full ordinary meaning without so holding.

If I am right in such conclusion, then sec. 76 says that "every instrument *affecting* the lands * * shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without actual notice, unless such instrument is registered, *in the manner herein directed*, before the registering of the instrument under which the subsequent purchaser or mortgagee claims."

Sec. 80 provides that "registration * * *under this Act*, * * shall constitute notice of the instrument, to all persons claiming any interest in the lands, subsequent to such registration, notwithstanding any defect in the proof for registration, * *" And by sec. 82 it is enacted that

Judgment. “Priority of registration shall prevail unless before the
Rose, J. prior registration there has been *actual notice* of the prior instrument by the party claiming under the prior registration.”

In my opinion, the plaintiff must fail unless he is in the same position as to registration as he would have been had the deed to Maddox in terms declared that Bryce granted to her the right to use the pipes running under house No. 116, describing the land on which such house stood, or through which such pipes ran, and the subsequent conveyances had followed the same form.

In other words, the purchaser of lot 3, plan 837, in searching his title to the lot, must have notice by the registration of the deed to Maddox and subsequent deeds that they affected lot 3; such notice to be given by registration against lot 3, if the deeds were subsequent to the registration of the plan, or against the prior division of the land if they were prior to the registration of the plan.

If the deed to Maddox had expressly stated that it granted the easements in question affecting the defendant's lands, describing them, what more would have been done by the registrar to give notice on his books that it affected the defendant's lands, than was done when the deed was registered in 1882, assuming that the registrar then did his duty? The duties and liabilities of registrars are discussed in *Harrison v. Brega*, 20 U. C. R. 324; *Macnamara v. McLay*, 8 A. R. 319; *Green v. Ponton*, 8 O. R. 471. I will assume that the land conveyed to Maddox was part of a lot as described in the patent thereof from the Crown, and that there was no registered plan affecting the portion in question. Then reading sec. 32 of the Registry Act and the form of abstract index, schedule M., referred to therein, it would seem to have been the duty of the registrar to enter the deed to Maddox in the abstract index, giving among other particulars the quantity of land conveyed. There is also a column No. 9 for remarks. Looking at the abstract index, the intending purchaser of the defendant's land would see that there was no conveyance or document

affecting the remaining thirty-one feet south of the land conveyed to Maddox, and which subsequently formed lot 3, plan 837. Judgment.
Rose, J.

If the purchaser asked for an abstract of title of lot 3, then under sec. 23 the registrar would prepare one, mentioning that part of the lot only, and confining the abstract to the deeds or documents affecting such part only. The person obtaining such abstract would not find upon it any mention of the conveyance to Maddox, because there was nothing in the description or otherwise in the deed to enable the registrar to discover that it in any way affected lot 3. The facts which caused the easement to exist and gave Maddox a right were outside of the deed, and could by no possibility be known from a perusal of the deed. If the grantee under such deed wished to preserve such rights as against a purchaser for value of the land so burdened, it became his duty either to give actual notice or to place in the deed such words as would notify the registrar that it affected such land.

Apart from what seems to me to be the express wording of the statute, it surely is more just to require a party who wishes to burden his neighbour's land with an easement which is not visible or apparent, to place in the registry office notice of the claim, than to subject a purchaser, who finds no sign upon the ground and no notice in the registry office, to the continuance of the burden, he being in fact a purchaser for value without notice.

I find further that on the 28th September, 1883, the plan No. 558 was registered, by which the land conveyed to Maddox became known as lot No. 29; and on the 16th of August, 1888, the plan No. 537, including the defendant's land, was registered—at least I take that to be the meaning of paragraph 7 of the admissions filed.

The deed to the plaintiff was registered on the 19th December, 1889, and not upon lot 3, so that as to lot 3 the plaintiff's deed is unregistered.

I refer to the observations of Patterson, J.A., in *Carter v. Grasett*, 14 A. R. at pp. 709, 710, the argument con-

Judgment. tained in which I desire to apply to the facts of this case.
Rose, J. The result was there stated as follows: "This deed does not mention lot 9. Therefore as a deed affecting lot 9, it was, under sec. 75, incapable of registration, and the registration of it as affecting lot 8, which it does mention, is no registration as against lot 9."

I desire to confine my decision to the case of easements which are not apparent, without saying how it would be if they are apparent.

The result is that the plaintiff was not entitled to maintain the drains through the defendant's property as against defendant, a purchaser for value without notice, the plaintiff being as to lot 3 an unregistered owner, and the defendant a registered owner.

The action will, therefore, be dismissed with costs.

At the Michaelmas Sittings of the Divisional Court, 1890, the plaintiff moved to set aside the judgment of ROSE, J., and to enter judgment for the plaintiff.

The motion was argued before ARMOUR, C. J., and STREET, J., on the 25th November, 1890.

Licknell, for the plaintiff. It is admitted that the conveyances were under the Short Forms Act, and were registered. There is no doubt that the plaintiff has an easement by implication over the lands of the defendant: *Briggs v. Semmens*, 19 O. R. 522; but it is said that his claim as against the defendant's land is defeated by the Registry Act. The effect of the judgment appealed from is to require a description of the easement and registration against the servient tenement. There is nothing in the Registry Act to justify this; see sec. 76 of R. S. O. ch. 114. The plaintiff's deed was registered in 1882; under it this easement passed by implied grant; and when he had registered it, he had done all he could do to give notice of it. In the case of all semi-detached houses there must be easements.

Kappele, for the defendant. The easement claimed is an interest in the land and capable of registration: *Ross*

v. *Hunter*, 7 S. C. R. 289. [ARMOUR, C. J.—You cannot Argument. register an implication.] A deed can be registered—the instrument which brings the easement into being. I rely on the judgment of Rose, J., in this case, and of Patterson, J. A., in *Grasett v. Carter*, 14 A. R. at pp. 709, 710; *Culverwell v. Lockington*, 24 C. P. 611.

Bicknell, in reply, referred to R. S. O. ch. 114, sec. 25; *Ewart v. Cochrane*, 4 Macq. 117; *Watts v. Kelson*, L. R. 6 Ch. 166; *McMaster v. Phipps*, 5 Gr. 253.

December 31, 1890. The judgment of the Court was delivered by

STREET, J. :—

It is clearly established law that where the owner of two adjoining lots conveys one of them he impliedly grants to the grantee all those continuous and apparent easements which are necessary to the reasonable use of the property granted, and which are at the time of the grant used by the owner of the entirety for the benefit of the part granted: *Suffield v. Brown*, 4 D. J. & S. 185; *Watts v. Kelson*, L. R. 6 Ch. 166; *Wheeldon v. Burrows*, 12 Ch. D. 31; *Bayley v. Great Western R. W. Co.*, 26 Ch. D. 434; *Birmingham, &c., v. Ross*, 38 Ch. D. at p. 308; and the rights of drainage and of aqueduct are within this category of easements. See *Pyer v. Carter*, 1 H. & N. 916, which does not seem to have been doubted in this respect. Therefore, the conveyance made in 1882 by Thomas Bryce to Emily Maddox passed to the grantee, her heirs and assigns, a right to have uninterrupted use of the drain leading from house No. 118, which was the house conveyed to her, through house No. 116, which the grantor retained, and a right to have the water conveyed to house No. 118 through the pipes leading to it from house No. 116.

The grant of these rights would have been implied under the circumstances as an incident to the express grant of house No. 118. There are also in the conveyance general

Judgment.

Street, J.

words sufficient to pass the rights claimed, and so to give them to the grantee by way of express grant. It is, however, here immaterial whether these rights are to be treated as arising under an implied or an express grant, in my opinion, because in either case the plaintiff is entitled to them as against the defendant. The doctrine of implied grant appears to have had its foundation in the natural equity to be found in the cases to which it is applied, which the Courts of law at an early date laid hold of and treated as a legal right: 25 Pl. 6, *Coppy v. J. de B.*; *Sury v. Pigott*, Palmer 444; *Nicholas v. Chamberlain*, Cro. Jac. 121. See also *Birmingham, &c., v. Ross*, 38 Ch. D. at p. 308. As against Thomas Bryce and those claiming under him as purchasers of house No. 116, with notice of the plaintiff's rights, there could be no question raised of his right to maintain them, and this whether the Registry Act is to be taken into consideration, or whether it is to be excluded.

If the Registry Act is to be left out of consideration, there can equally, I think, be no doubt that the plaintiff, claiming under a prior legal grant, although an implied one, would not be affected by the fact that the defendant, claiming under a subsequent grant, although an express one, was a purchaser without notice.

The only question therefore remaining is whether the rights of the plaintiff have been taken from him by the Registry Act.

The Registry Act requires instruments affecting lands to be registered; originally it did not interfere with rights, legal or equitable, arising otherwise than by instruments capable of being registered: *Harrison v. Armour*, 11 Gr. 303. Then it was amended so as to postpone in certain cases unregistered equitable rights whether based upon written instruments or not, but this left untouched the case of legal rights arising otherwise than under written instruments. If, therefore, the rights in question here are to be treated as arising under an implied grant, they are outside the effect of the Registry Act; and, being prior in

point of time, and arising under a grant, they must prevail over the defendant, a subsequent purchaser of the estate out of which they were granted.

Judgment.

Street, J.

If they are to be treated as arising under express grant, undoubtedly the Registry Act applies, but I am unable to see that the defendant's position is strengthened. There is nothing in the Act requiring the creation of legal rights or their transfer to be evidenced by any new forms of words; it only requires that the instruments creating or transferring rights to land shall be registered; and when registered in the due order of their dates, no provision in the Act disturbs the effect which would have been given to them had no registry law prevailed. Here the plaintiff's conveyance is prior in point of time to the defendant's; it passed certain legal rights to the plaintiff in the land which the defendant subsequently purchased. The instrument under which these rights passed is first in point of time and first in point of registration, and therefore there is nothing in the Registry Act to take away the rights acquired by the plaintiff under it.

I find myself obliged, with great respect, to differ from the dicta of Mr. Justice Patterson found in *Carter v. Gra-sett*, 14 A. R. at pp. 709, 710, in so far as they affect this question.

The Registry Act excepting in one instance provides for the registration of all instruments affecting the lands, however wide or general may be the description of the lands intended to be affected. Those instruments containing a description so general that the lands affected cannot be identified are to be registered in a book kept for that particular purpose; but the effect given to a registered instrument containing a general description differs in no wise from that given to one containing a particular description; the registration of both classes of instruments operates as notice to the world of their existence.

The one and only case in which a registrar is forbidden to register a conveyance by reason of the description of lands contained in it is that of a conveyance made after

Judgment. the registration of the plan of a sub-division where the conveyance does not conform and refer to the plan: sub-sec. 2, sec. 84, ch. 114, R. S. O. Now it appears to me that the only meaning of this section is to require that conveyances of land forming part of the sub-division shall describe the lands conveyed by reference to the sub-division, and not by reference to the original lot which has been sub-divided, and that, for the purpose of avoiding the confusion which might arise from describing lots by reference to a description which has been changed, the registrar shall refuse to register conveyances which do not conform and refer to the registered sub-division. I find no indication in this clause of an intention to require a more particular or exact description of parcels which form part of a registered sub-division, than of parcels which form part of an original lot, and yet, that, it seems to me, must be the effect of the section if it is to bear the construction placed upon it by the dicta to which I have referred. The conveyance under which the plaintiff claims here complied with the provisions of the section in question when it referred to the sub-division and plan of which the lot mentioned in it formed part; the registrar could not possibly have refused to register it; and, being registered, it was, I think, notice of the conveyance of everything which according to law passed under the description contained in it or as incident thereto.

For these reasons I am of opinion that the judgment of the learned trial Judge should be reversed, and that judgment should be entered for the plaintiff for \$125, at which sum the damages have been fixed by agreement of the parties, together with full costs of the action and motion upon the High Court scale.

[CHANCERY DIVISION.]

HICKEY V. HICKEY ET AL.

Will—Devise—Misdescription of land.

A testator owning lots 6 and 8 in the 1st concession devised the same in his will in two separate devises as "My property known as lot * * * 2nd concession, &c." :—

Held, that his lots in the first concession passed.

THIS was an action brought to have it declared that Statement. certain property devised by the will of one James Hickey, passed under said will although misdescribed.

There were two devises in the words "my property known as lot No. 6, 2nd concession south of Dundas street, &c.," and "my property known as part of lot No. 8, 2nd concession south of Dundas street, &c."

It appeared the only properties owned by the testator were lot 6 in the first concession, and lot 8 in the first concession.

The matter came up by way of motion for judgment on March 4th, 1891, before BOYD, C.

A. McKechnie, for the plaintiffs. The will should be amended by substituting "first concession" for "second concession" in both the devises. The testator manifestly made an error in the number of the concession through inadvertence. This case is similar to *Doe. Lowry v. Grant*, 7 U. C. R. 125, and *Wright v. Collins*, 16 O. R. 182 [BOYD, C., the point was considered by the full Court in *Hickey v. Stover*, 11 O. R. 106].

J. Hoskin, Q.C., for the infant. If the testator had said "all my property," and there had been only one devise a description of the property would not be necessary under *Lowry v. Grant*, but those words are not used, and there are two devises in this will. This case comes under *Hickey v. Stover*, and the correction should not be made.

Judgment.

Boyd, C.

Boyd, C. (at the close of the argument.) In *Hickey v. Stover*, there was a definite devise by description of certain property. Here the words used are "*my property* known as lot, &c.," and it is shown that the testator only owned two parcels of land, both in the second concession. He has devised two parcels describing them as "*my property*," and giving the proper numbers of the lots, but the concession has been called the "*second* concession" instead of the "*first* concession" manifestly through inadvertence. I think it is a case in which it should be declared that the property owned by the testator in the first concession passed by the will although described as of the second concession.

G. A. B.

[CHANCERY DIVISION.]

BEATTY V. DAVIS ET AL.

Game—Fishing and shooting rights—Private ownership—Navigable private waters—Waters artificially rendered navigable by public improvements.

Ownership of land or water, though not enclosed, gives to the proprietor, under the common law, the sole and exclusive right to fish, fowl, hunt, or shoot within the precincts of that private property, subject to game laws, if any; and this exclusive right is not diminished by the fact that the land may be covered by navigable water. In such case the public can use the water solely for *bond fide* purposes of navigation, and must not unnecessarily disturb or interfere with the private rights of fishing and shooting.

Where such waters have become navigable owing to artificial public works, the private right to fishing and fowling of the owner of the soil must be exercised concurrently with the public servitude for passage.

THIS was an action brought by S. G. Beatty against J. W. Davis, and Jonathan Blong, claiming damages for trespass upon his lands, and injuries to his right of sporting over the said lands. The lands in question were in the township of Reach, in the county of Ontario, and composed, as alleged by the plaintiff, of that part of the Scugog Marsh consisting of lots 20 and 21, in the 4th and 5th concessions of the said township. The plaintiff also alleged in his statement of claim that he was the owner of these lands, and of the right of hunting, shooting, fishing, and otherwise sporting over the same; that on various days mentioned the defendants, while trespassing thereon, killed and took wild duck and other game, and refused to leave or desist, though requested so to do. Statement.

By their defence, the defendants put the plaintiff to his proof of title, and denied all material allegations, and further said that the lands were, and always had been, wholly unenclosed, and wholly covered by the waters of Lake Scugog, which waters were navigable waters: that the lands formed part of what is known as the marsh lands of Lake Scugog, which cover over 2000 acres, all being unenclosed, unimproved, and covered by the waters of the said lake, and the defendants submitted that they

Statement. in common with all Her Majesty's subjects had a right to enter on or pass over the said lands for the purpose of shooting, hunting, or fishing, doing no damage to the said lands.

By special reply the plaintiff denied that the water in question was navigable, and alleged that it was for the most part shallow and marshy: that the said lands, and the water covering the same, were cut off and divided from Lake Scugog by a solid embankment built along the road allowance between the 5th and 6th concession of the said township of Reach, and the only communication between Lake Scugog and the said lands by boat was by means of a culvert under the said embankment through which, except at high water, it was possible to pass in small skiffs and pleasure boats, and not otherwise: that about 1844 a dam was erected across the Scugog River at or near the town of Lindsay, whereby the level of Lake Scugog was raised to a height of several feet above its former level, whereby the said lands were overflowed, the same having previously been above the level of the lake: that if Lake Scugog was now navigable it had been made so by the said dam, and was and is non-navigable in its natural condition: that even if the waters covering the said lands are and were navigable, the defendants had no right to enter upon or pass through or over the same for the purpose of shooting or fishing, or for other purposes of pleasure, the said lands having been granted by the Crown to persons through whom the plaintiff claimed, and the plaintiff referred to R. S. O. 1887, ch. 24, sec. 47.

The remaining facts of the case sufficiently appear from the judgment of the Chancellor.

The action came on for trial at Whitby, on December 8th, 1890, before BOYD, C., when the argument was adjourned to Toronto, where it took place on December 13th, 1890.

McCarthy, Q. C., and H. S. Osler, for the plaintiff. We say the place in question is not navigable in any sense,

and if it was it would not give the defendants the right to fish or shoot there: *Regina v. Meyers*, 3 C. P. 305; *Orr-Ewing v. Colquhoun*, 2 App. Cas. 839; *Mussett v. Burch*, 35 L. T. N. S. 486; *Pearce v. Scotcher*, 9 Q. B. D. 162; *Murphy v. Ryan*, 2. Ir. R. C. L. 143, 16 W. R. 678; *Attorney-General v. Mathias*, 4 Kay & J. 590; *Constable v. Nicholson*, 14 C. B. N. S. 230; Williams on Rights of Common, p. 194; *Neil v. Duke of Devonshire*, 8 App. Cas. 135; *Bristow v. Cormican*, 3 App. Cas. 641; *Foster v. Wright*, 4 C.P.D. 438; *Rattè v. Booth*, 14 A.R. 419, 11 O.R. 491; *Hargreaves v. Diddams*, L.R. 10 Q. B. 582; *Wickham v. Hawker*, 7 M. & W. 63; *Blades v. Higgs*, 20 C. B. N. S. 214, 11 H. L. 621; *Ewart v. Graham*, 7 H. L. Cas. 331; *Lord Leconfield v. Dixon*, L. R. 3 Exch. 30; *Sowerby v. Smith*, L. R. 8 C. P. 514, 9 C. P. 524; *Webber v. Lee*, 9 Q. B. D. 315; *Beauchamp v. Winn*, L. R. 6 H. L. 223; *Long Point Co. v. Anderson*, 19 O. R. 487; *Brady v. Sadler*, 17 A. R. 377. Entering on the land was a trespass, and we should have a declaration of right: Co. Inst., p. 4; Chitty's Blacks., vol. 2, p. 166. To frighten game is an injury to property: *Currington v. Taylor*, 11 East 571, S. C. 2 Camp. 258; *Keeble v. Hickeringill*, 11 East. 574; *Ibbetson v. Peat*, 3 H. & C. 644; *Jeffries v. Evans*, 19 C. B. N. S. 264; *Holford v. Bailey*, 13 Q. B. 426. In no view was the water a navigable stream: Angell on Watercourses, ch. 3, sec. 62; *Esther Rowe v. Granite Bridge Corporation*, 21 Pick. 344; Angell on Highways, 3rd ed., p. 46; *Parke v. Elliott*, 1 C. P. 470; *Ross v. Corporation of Village of Portsmouth*, 17 C. P. 195; R. S. O. 1887, ch. 24, sec. 47; Williams on Rights of Common, pp. 18, 268, 194; R. S. O. 1887, ch. 118, sec. 15.

Patterson, Q. C., for the defendant. The waters of the lake flooded the land by reason of the dam, and a right so to flood it has been acquired by prescription, and the same law applies as to bodies of water naturally navigable: *Miles v. Rose*, 5 Taunt. 705; *Regina v. Meyers*, 3 C. P. 310; *Sullivan v. Spotswood*, 82 Ala. 163; *Walker v. Allen*, 72 Ala. 456; *Shaw v. Oswego Iron Co.*, 10 Oreg.

Argument. 371, 45 Am. R. 146; *Smith v. Fonda*, 64 Miss. 551; cases collected in 10 Abbott's New Cas. at pp. 116, 121; *Marshall v. Ullswater Steam Navigation Co.*, 7 Q. B. 166; Coulson and Forbes on Waters, p. 236; Gould on Waters, secs. 225, 340, 352. Water fowl is not to be treated as game, which are beasts or birds of warren: R. S. O. 1887, ch. 221, sec. 10; *ib.* ch. 101; *ib.* ch. 98, sec. 15. The game laws were not introduced by the Act of 1792, and are not applicable to this country. I refer to *Gage v. Bates*, 7 C. P. 116; Shultes' Aquatic Rights, p. 100; *Attorney-General v. Harrison*, 12 Gr. 466; Stephen's Comm. on Blacks., 11th ed., vol. 2, pp. 4, 5, 6; *Ib.* vol. 1, pp. 637-641; Williams on Real Property, 13th ed., pp. 27-31; *Brockington v. Palmer*, 18 Gr. 488; *North Union R. W. Co. v. Bolton and Preston R. W. Co.*, 3 R. Cas. 345; *Martin v. Douglas*, 16 W. R. 268; *Holyoake v. Shrewsbury and Birmingham R. W. Co.*, 5 R. Cas. 425.

McCarthy, in reply. It cannot be urged that the law of property was not introduced into this country. The right to fish and fowl do not depend on game laws. If the defendants had the right to go in boats through the culvert, they had none to fish or shoot. We sue on our common law right as owner of the land: *Duke of Devonshire v. Lodge*, 7 B. & C. 36; *Jefferies v. Evans*, 19 C. B. N. S. 264; *Malcomson v. O'Dea*, 10 H. L. Cas. 593; *Ray v. Myers*, *supra*, at p. 346; *Bostock v. Staffordshire R. W. Co.*, 5 D. & Sm. 584. Lake Scugog is not a public navigable water, and it cannot be fished in as of right by the public anywhere.

January 6th, 1891. BOYD, C.

The questions to be dealt with are altogether independent of the frame or policy of the game laws, and fall to be determined upon the common law rights of the owners of property in respect of fish and wild creatures fit for food harbouring thereon. The right to take and kill fish and water fowl is one which has attached immemorially to

the waters, wastes, or marshes, where they are found. It is variously spoken of in the books as being an incident of territorial right, as being accessory to the ownership of the soil, as arising *ratione soli*, and also (in the case of fish) as being a riparian right. Owing to the creation of the rights of free warren and of piscary, as franchises distinct from the ownership of the soil, and also owing to the multiplication of game and fishery laws in Great Britain, modern cases do not throw much light upon the matters in dispute on this record. But after a perusal of many legal texts and old authorities I have no doubt that it may be laid down as a general rule that ownership of land or water (though not enclosed) gives to the proprietor the sole and exclusive right to fish, fowl, hunt, or shoot (as the case may be) within the precincts of that private property.

Judgment.
Boyd, C.

This general proposition being treated as fundamental, the special facts of this case are to be considered. The land owned by the plaintiff is now composed in part of marsh or swamp, and in part of land covered by water which can be traversed by boats, though not to the same extent at all seasons. It is the haunt of wild duck and fish, the latter especially during the spawning season.

Early in the century, however, the character of the place was, broadly speaking, dry land channelled with streams or creeks running into Lake Scugog. This is conclusively proved, not merely by the early plans but by evidence *in rem*,—visible local testimony,—consisting of trees long since dead, measuring in diameter over twelve inches. This growth of trees was killed by the place being submerged about sixty years ago by the construction of a dam for public purposes at a point in this chain of inland waters somewhere near Lindsay. The effect of this was to pen back and so deepen the water of the whole system, and at this place to the extent of some six or eight feet. There was a reconstruction or a lowering of this dam about 1844, whereby the water was brought to its present level which is some three feet higher than the natural surface of the ground and water. The early condition of this stretch of

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water is found in its Indian name Scugog (meaning shallow muddy water), and for the purpose of utilizing it as an inland waterway, the above public works were undertaken and maintained. Regarding the particular lots claimed by the plaintiff, the old plan of 1810 shews that all the lots were out of the waters of the lake, and that a creek ran through the whole length of lot 20 in the 4th, and lot 21 in the 5th concession, impinging slightly on the north-east corner of lot 20, in the 5th, and the south-east corner of 20, in the 4th concession. At the point where it intersects the plaintiff's land, about at the present culvert, this stream would then have been at least three feet deep, so that it formed at that time a channel probably traversable by canoes and small craft. At the present time owing to the deepening of the water artificially, boats can go over the greater part of all the lots at times, and it was on the most southerly part of lot 21, in the 4th concession, that the shooting complained of was done by the defendants from boats by which they had entered from the lake proper. Generally speaking, I should say that some parts of the property claimed by the plaintiff are covered by water which is practically navigable, though he nevertheless is the owner of the soil covered by that water. Looking at the concession lines and side roads in the vicinity of the plaintiff's property, it would appear that the public using those roads till they came to the water's edge, could go over the water and through the culvert in order to reach the lake.

Lot 21, in the 4th concession, through which the creek flowed originally, is the only lot owned by the plaintiff at the beginning of the action, which was patented in 1811: the other two lots, 20 in the 4th, and 21 in the 5th concession, were patented in 1846, at which time the drained land was the same as it is now. Lot 20 in the 5th concession was not acquired till after action, though it was patented in 1811.

The grant of lot 20 in the 4th, and 21 in the 5th concession, would therefore be in the condition in which

they then were, and as to them a public interest for navigation purposes had arisen prior to the patent. These parts of the land would have then become *de facto* by artificial means navigable waters in the Province within the meaning of 23 Vict. ch. 2, sec. 35 (now R. S. O. 1887, ch. 24, sec. 47), and the grant of the land would be subject to rights of navigation.

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Boyd, C.

The lot earlier patented would have been injuriously affected by the construction of the dam at Lindsay, and it must be taken if compensation was granted therefor it was actually made, or could have been obtained; and either way the owner cannot now object to the public use of the submerged land for purposes of navigation.

The Legislature of Upper Canada, in 1833, passed an Act 3 Wm. IV., ch. 32, for the Improvement of Inland Waters in the district of Newcastle, wherein it was recited that it was expedient to improve the navigation of the river Otonabee, and also the adjacent waters leading from Mud Lake to Scugog Lake in the township of Ops, which comprehends the area now under consideration. The said Act further recited that such "navigation is manifestly advantageous to the surrounding settlement, and would if improved greatly extend the benefits of commerce in the said district." Later legislation in the same direction may be found in the old statutes which it is not needful to detail. I refer generally to this legislation to shew the intervention of government in the execution of a scheme which was to be of public benefit. There is also a legislative declaration of public interest existing in the River Scugog by R. S. O. 1887, ch 120, s. 3.

In Hale *de jure Maris*, it is said: "If any person at his own charges makes his own private stream to be passable for boats or barges, either by making locks or cutts, or drawing together other streams, and hereby that river, which was his own in point of propriety become now capable of carriage of vessels; yet this seems not to make it *publici juris* and he may pull it down again, or apply it to his own private use. For it is not hereby made *juris publici*,

Judgment. unless it were done at a common charge, or by a publick authority, or that by long continuance of time it hath been freely devoted to a public use." (See Appendix to Hall's "Sea Shore," 2nd ed., p. 6.)
Boyd, C.

If the area of drowned land has thus become navigable, then every part of it is available for purposes of navigation, and I cannot draw the line so as to exclude any part of the water practically navigable which is formed over the plaintiff's soil: *Williams v. Wilcox*, 8 A. & E. 328. The right, however, is one of way, and does not warrant roving or rambling, for no useful purpose, over the fishing or fowling parts of the plaintiff's property. The right of navigation where it exists is to be used so as not to unnecessarily disturb or interfere with the enjoyment of the subordinate private rights of fishing and shooting.

The question as to extent of navigation over or upon the plaintiff's lots is not so clearly before me in evidence as to justify any definitive judgment upon that part of the case. But enough appears to prevent any declaration of private right which would negative the claim of the public to use any navigable channels upon the plaintiff's land. This course should, I think, be taken, even if there existed no original channel or creek leading to the lake through this land. That is to say, if this place was made navigable solely by artificial work as a public undertaking, then the private right in the plaintiff of fishing and fowling must be exercised at least concurrently with the public servitude for passage. Where fresh waters are practically navigable by whatever means in the way of public improvement, there the public may use the water for *bond fide* purposes of navigation, but not so as to occupy the water for the purpose of fishing or fowling when the soil underneath is the private property of one who objects to such occupation.

The result of the whole is, that the defendants are in the wrong: they came upon the place, not for purposes of navigation, but to shoot ducks against the protest of the plaintiff. The custom relied upon of persons or of the public going to shoot or fish in that locality year after

year does not afford any defence in law against the private rights of the owner. The fact of the place being to some extent navigable water, does not justify any interference with private rights of fishing and fowling.

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Boyd, C.

Having regard to the novelty of the action, and the fact that the plaintiff has not entirely succeeded because of the issue as to navigable or non-navigable water, I give judgment against the defendants, with \$40, which I assess for damages and costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

CUMMING ET AL. V. LANDED BANKING AND LOAN
COMPANY.

Trusts and trustees—Joint character of executors and trustees—Taking securities in name of one of two joint executors and trustees, as trustee—Termination of executorship—Pledging securities for advance—Misapplication of moneys advanced—Breaches of trust—Notice to pledgees—Following securities—Burden of proof—Infant executor—Judgment against defaulting trustee.

A sole executor or the surviving executors of a deceased person may, at any time within twenty years from the death of the testator, sell or pledge any of the assets of the estate to any purchaser or mortgagee who has no notice of a breach of trust, and the purchaser or mortgagee is under no obligation to make inquiry as to the destination of the purchase or mortgage money or to see to its application; but with regard to trustees there is no rule which entitles a person advancing money to them to disregard the notice which is found in the mere description of trustee, that the person to whom it is applied is not absolute owner of the security which he proposes to pledge.

By a will two persons were appointed executors and trustees, one of the trusts being to invest the moneys of the estate; both proved the will, though one was at the time an infant; the other invested certain moneys of the estate in mortgages, which were made to himself alone "as trustee of the estate and effects of J. C., deceased;" and ten years after the testator's death he hypothecated these mortgages to the defendants for advances, which he misapplied:—

Held, that when the defendants found securities of a permanent character vested in one of the trustees named in the will, as a trustee, they were charged with notice that these were securities which he held as trustee, and not as executor, and that he was committing a breach of trust in holding, in his separate name, securities belonging to a joint trust; and therefore that the plaintiffs, representing the estate, were entitled to have the mortgages transferred to them and to make the defendants account for the moneys paid thereon:—

Held, also, that as the defaulting trustee had no power to pledge the assets of the estate, the onus was upon the defendants to shew that the proceeds were applied for the purposes of the estate:—

Held, also, that the grant of probate to the infant executor along with the adult was not a nullity:—

Held, lastly, that the recovery of judgment by the plaintiffs against the defaulting trustee for the amount advanced by him upon these mortgages did not bar the right of action against the defendants.

Judgment of *Boyd, C.*, 19 O. R. 426, affirmed.

Statement.

THE defendants appealed to the Divisional Court from the judgment of *Boyd, C.*, reported 19 O. R. 426, where the facts are stated, in addition to which it may be mentioned that in the assignment to the defendants *Thomas B. Wragg* was described as a party in the same manner as in

the mortgage, and on executing the assignment he wrote Statement the word "trustee" after his name.

The appeal was argued before ARMOUR, C. J., and STREET, J., on the 21st November, 1890.

Edward Blake, Q. C., for the defendants. Robert T. D. Cumming and Thomas B. Wragg were the executors named in the will of James Cumming. Robert Cumming was a minor; Wragg managed the estate. He advanced moneys of the estate to Brignall and Foley, and took mortgages from them in which he alone was named as mortgagee. He at first pledged these mortgages to the Building and Loan Association, but the terms were found to be onerous, and an arrangement was made with the defendants; the Building and Loan Association were paid off, and a sub-mortgage made to the defendants. The evidence is contradictory as to what became of the money raised on the mortgages. Wragg was indebted to the estate; he was removed from his office, and a judgment obtained against him for \$149,000. Wragg paid some moneys to the defendants. The claim in the action is that the defendants are parties to a breach of trust and are responsible to the plaintiffs, representing the Cumming estate, for the amount.

1. What is to be considered the true position of Wragg? Trustee or executor? What is a fair view of his real position at the time of the transaction? The whole will is important in this regard. I submit that it is an error to say that his executorial functions had ceased or could cease. It is the duty of executors to collect and distribute the assets of the estate; and at the time of this transaction the period of distribution had not arrived. Executorial functions extend to investing and keeping invested the funds of the estate: R. S. O. ch. 110, secs. 29, 30. The use of the words "trustee" and "trust" is of little consequence in a case like this; for it is so palpable that the executors are trustees. All executors are trustees; and the assets coming to their hands as executors are trust.

Argument. assets, although the executors' dominion over them is wider than that of simple trustees: *Williams on Executors*, 8th ed., pp. 936, 939, 1803, and cases cited; *Booth v. Booth*, 1 Beav. 125. The same view is indicated in decisions as to who are executors according to the tenor of the will, where none are expressly appointed; in these cases we find trustees entrusted with the execution of the will: *Re Hamilton*, L. R. 17 Ir. 277; *In re Ryan and Cavanagh's Contract*, *ib.* 42. *Williams v. Nixon*, 2 Beav. 472, is in the same direction; see pp. 475, 476. *McLeod v. Drummond*, 17 Ves. 152, is also a case of executors and trustees; I refer to it, at p. 168 especially, for the proposition that, where the combined position exists, the enlarged power and the diminished responsibility of executors is considered applicable. This case is also important on the question of delay. I cite *Earl Vane v. Rigden*, L. R. 5 Ch. 663, for the power of executors to pledge; *Farhall v. Farhall*, L. R. 7 Eq. 286, for the power to do it *quâ* executor, and for the application of the executorial functions. *Hill v. Simpson*, 7 Ves. 152, at p. 165, shews that an executor is a trustee, and this is important in regard to Wragg's being called "trustee" in the mortgages. *Corser v. Cartwright*, L. R. 7 H. L. 731, at p. 737, shews the power of an executor who is also devisee of land charged with the payment of debts, and that the presumption is that he mortgages for the payment of debts. Upon this line of authorities and reasoning, I ask your Lordships to rule that at the time of these transactions the position of Wragg, as to dealings with third persons and with the assets of the estate, was that of executor as to his powers and their responsibilities.

2. What was the transaction? I ask the Court to determine that the description of Wragg as trustee in the mortgages, did not alter the true character. I aver that the executorial functions had not ceased, and though he was a trustee, as every executor is a trustee, he cannot, by calling himself a trustee, be held to have rid himself of his powers as executor, and to have increased the responsibility of persons dealing with him: *Pinkett v. Wright*, 2

Ha. 120. Can it be said that the defendants, by the fact that the instruments described Wragg as "trustee," and by what the correspondence indicated as the nature of the transaction, were under an obligation to look at the will, which was no part of the title they were accepting, or to take the accounts of the Cumming estate?

3. What is the position consequent upon the judgment against Wragg? We contend that, having recovered against Wragg, the plaintiffs have no right to recover against us: *Kendall v. Hamilton* 4 App. Cas. 504; *Willcocks v. Howell*, 8 O. R. 576.

4. Subject to the disputed question of fact, it may be said that some of the money received by the defendants was not paid by the mortgagors, but by Wragg. To the extent to which Wragg actually paid this money, there ought to be some inquiry to decide the extent of liability, if any is held to exist.

I submit that there has been an erroneous limitation of the powers of Wragg, and an erroneous extension of the responsibilities of others, and that the action must be dismissed.

MacKelcan, Q. C., on the same side. Test the position of the defendants and the powers of Wragg by supposing that instead of assigning the mortgages, he had induced the mortgagors to pay them off, and had discharged them, getting a new loan from the defendants on mortgages made by the mortgagors direct to the defendants. The transaction would be unimpeachable; but the money would have gone into Wragg's pocket, and this transaction was the same in effect. I refer to *Berry v. Gibbons*, L. R. 8 Ch. 747; Coote on Mortgages, 5th ed., pp. 308-315; *Cruikshank v. Duffin*, L. R. 13 Eq. 555. An executor has power to mortgage. The legacies here had not been paid, and Wragg still held office and acted as executor: *Watkins v. Cheek*, 2 Sim. & Stu. at p. 205; *Earl Vane v. Bigden*, L. R. 5 Ch. 663; *Child v. Thorley*, 16 Ch. D. 151; *Miles v. Durnford*, 2 D. M. & G. 641; *In re Queale and Royal Bank*, L. R. 17 Ir. 361. Robert

Argument. Cumming, being an infant, was never really clothed with the character of executor: Williams on Executors, 8th ed., pp. 235-6. There is an estoppel against the plaintiffs by the judgment against Wragg: *Cambefort v. Chapman*, 19 Q. B. D. 229.

A. H. Marsh, Q.C., for the plaintiffs. If Wragg acted as executor, the plaintiffs might have difficulty in establishing their case. But he acted as trustee. He was not practically sole acting trustee. The defendants magnify Wragg's office and minimize what Robert Cumming did. Wragg when examined says he did not take all securities in his own name, but took some in the names of himself and Cumming. We find by the will itself that there was an express trust. It is true, in a sense, that every executor is a trustee, but every executor is not an express trustee. One executor may act, but not one trustee. Every executor is not a trustee in the sense that Wragg was; he was an express trustee, and he was not a sole trustee. Robert Cumming in fact, though an infant, proved the will, and the probate cannot be attacked in this action; it was at most voidable, not void. The will devises all the property to the executors, or such of them as shall prove the will, upon the trusts set out in the will. When the testator appoints his executors, or such of them as shall prove the will, trustees, he means those who shall in fact prove the will, and, as Robert Cumming did so, he became a trustee under the express terms of the will. It is true that the mere fact that Wragg named himself trustee did not make him a trustee; but this, coupled with the facts that the transaction was ten years after the death of the testator, and that there was a large estate to invest, was quite sufficient to shew that Wragg was acting *quod* trustee and not *quod* executor. But if anything further is needed, there is the evidence of Mr. Slater, the defendants' manager, from which it appears that the defendants were dealing with Wragg as trustee, and did not even know he was executor, or of the existence of the will. It was argued for the defendants at the trial that they had no notice of

the will. If a man has the dual character of executor and trustee, I admit that persons may deal with him as executor, but here the defendants did not. Where a man occupies two positions, one in which he can make a good title, and one in which he cannot, if persons choose to deal with him in the latter, they cannot take advantage of the former: Fisher on Mortgages, 4th ed., sec. 428; *Hill v. Simpson*, 7 Ves. at pp. 169, 170. That is law on the principle which protects the public in dealing with executors. It would be asking too much to ask the public to see to what executors did with money paid to them. I do not attack the proposition that an executor may dispose of assets and that the purchaser is not bound to see to the application of the purchase money; but that proposition has no application where the purchaser does not deal with him *quod* executor. The presumption that a man does an act in the capacity in which he has the power to do it, I do not dispute. That does not apply where a man doing it in one capacity would be doing it tortiously. Some light is thrown on that by *Gaston v. American Exchange National Bank*, 29 N. J. Eq. at pp. 102, 103.

As to breaches of trust, of which we say the defendants had due notice, the Chancellor relies on *Bank of Montreal v. Sweeney*, 12 App. Cas. 617, which has been recently followed in *Duggan v. London and Canadian Loan and Agency Co.*, 19 O. R. 272. This case goes further; here the words used gave notice of the existence of a trust, quite apart from the doctrine of these cases. The distinction is discussed in *Bayard v. Farmers' Bank*, 52 Pa. St. at pp. 237-8; Jones on Pledges, sec. 474.

The breaches of trust were: 1. When Wragg took the securities in his own name solely: *Consterdine v. Consterdine*, 31 Beav. 330; *Lewis v. Nobbs*, 8 Ch. D. 591; Lewin on Trusts, 8th ed., p. 337. As the defendants had notice that there was a trust, they were put upon inquiry. 2. It was a breach of trust to convert mortgages in the way Wragg did. The trust in the will was to keep invested. It was a breach of trust to melt the securities down. A

Argument.

sub-mortgage was an extraordinary thing for a trustee to make. The statute is no authority for that. The principle on which the plaintiffs claim to succeed is that of the ear-marking and following of trust funds: *Re Hullett's Estate*, 13 Ch. D. at pp. 708 *et seq.*; *Third National Bank of St. Paul v. Stillwater Gas Co.*, 26 Am. Law Register 253; *Shaw v. Spencer*, 100 Mass. 382.

There is no onus on the plaintiffs to shew that the moneys advanced to Wragg were not used for the benefit of the estate. As soon as the plaintiffs shew a breach of trust, the onus is shifted. But if the onus is on the plaintiffs, they have satisfied it. Then it is said that Wragg covenanted in the sub-mortgage to pay these moneys to the defendants, and that he did pay certain sums, but if he did, (and there is no evidence that he did) it was out of the moneys of the estate.

Blake, in reply. I maintain that the authorities I have cited support my proposition that powers and responsibilities are measured by the dealing of executors with the personal estate ascribed to executors, and that the acts of Wragg should be treated as executorial acts, both with regard to powers and responsibilities. There was power to do the acts which were done here, in the sort in which they were done, in the exercise of executorial functions. It is said that the defendants accepted Wragg in the exercise of a power which he could not effectually exercise. If that be so, of what had the defendants notice? Can they be in a worse position than if the will had been laid before them? The most that can fairly be said is that if the defendants had had before them the instrument which created the power, they would have been bound by it; but if they had, they would have become aware of the power of Wragg as executor. Lapse of time does not put a person on inquiry. These mortgages were assets of the estate; the assets are the same no matter what different shapes they pass into. "Trustee" was not an inappropriate phrase by which to describe an executor. The defendants dealt with Wragg by whatever title he had a right to deal

with them by. The passage cited from Fisher is founded Argument. on *Hill v. Simpson*, 7 Ves. at pp. 169, 170, which is an authority for the proposition that the utmost penalty the defendants can be put to is that of looking at the will, and when looked at, it discloses that Wragg had the power to act for the estate.

December 31, 1890. The judgment of the Court was delivered by

STREET, J. :—

This was a motion to set aside the judgment of the Chancellor in favour of the plaintiffs, reported in 19 O. R. p. 426, and to enter judgment for the defendants.

The grounds relied on in the argument of the motion were chiefly as follows :—

That Wragg acted as executor of the estate of James Cumming, and as such had a right to dispose of the assets, and that the defendants were not bound to inquire into the reasons which required him to borrow the money in question, nor to see to its application; that one of several executors has such a power of sale or pledge; and that in the present case the co-executor was an infant when appointed, and there was therefore good reason for his not being named as one of the mortgagees in the mortgages in question; that it was not shewn that the moneys which he received were misapplied; that the claim, if any, had been merged in the judgment obtained by the plaintiffs against Wragg; and, at all events, that as to a sum of \$1,898 paid to them by Wragg on account of the advance they made to him, they are not chargeable.

The power of a person in the position of an executor to deal with and dispose of the assets of the estate, and the absence of any duty on the part of the person purchasing from him or lending to him, to make any inquiry as to the destination of the purchase money or of the money loaned, are declared by numerous authorities. I

Judgment. shall content myself with a few extracts which seem to
Street, J. me to set forth these powers and duties. In *Keane v. Roberts*, 4 Madd. at p. 357, Sir John Leach thus summarizes the law: "Every person who acquires personal assets by a breach of trust, or devastavit in the executor, is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust by buying or receiving as a pledge for money advanced to the executor at the time any part of the personal assets, whether specifically given by the will or otherwise, because this sale or pledge is held to be *primâ facie* consistent with the duty of an executor. Generally speaking, he does become a party to the breach of trust by buying or receiving in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt, because this sale or pledge is *primâ facie* inconsistent with the duty of an executor."

In *Watkins v. Cheek*, 2 Sim. & Stu. 199, quoted by Lord Cairns in *Corser v. Cartwright*, L. R. 7 H. L. at p. 736, the same learned Judge says: "So a mortgagee or purchaser from the executor of a part of the personal property of the testator has a right to infer that the executor is, in the mortgage or sale, acting fairly in the execution of his duty, and is not bound to inquire as to the debts or legacies. But if the nature of the transaction affords intrinsic evidence that the executor in the mortgage or sale, is not acting in the execution of his duty, but is committing a breach of trust, as where the consideration of the mortgage or sale is a personal debt due from the executor to the mortgagee or purchaser, there such mortgagee or purchaser being a party to the breach of trust, does not hold the property discharged from the trusts, but equally subject to the payment of debts and legacies as it would have been in the hands of the executor. The same principle is applicable to real estate."

In *Earl Vane v. Rigden*, L. R. 5 Ch. at p. 669, Lord Hatherley says: "In the eye of this Court, as well as in

the eye of a Court of law, the executor is the absolute owner of the property; he does not stand in the position of a *delegatus*, and nothing can intercept that ownership, except fraud or collusion as between him and the parties with whom he deals."

Judgment.
Street, J.

The reason for these rules is thus stated by Lord Thurlow in *Scott v. Tyler*, 2 Dick. at p. 725: "It is of great consequence that no rules should be laid down here which may impede executors in their administration, or render their disposition of the testator's effects unsafe, or uncertain to the purchaser; his title is complete by sale and delivery; what becomes of the price is no concern to the purchaser."

The next question which suggests itself in the present case is whether there is any, and if so what, period of time from the death of the testator, after which the presumption ceases that a person who has been appointed executor is acting within the scope of his duty as such in selling or pledging the assets of the estate. In the present case the testator died in 1873, and the advance by the defendants was made in 1883.

A somewhat similar question arose in *Ewart v. Gordon*, 13 Gr. 40, where certain debentures, belonging to an estate of which the plaintiffs were executors, were pledged eleven years after the testator's death, by one of their number, as security for certain advances made to him in good faith by the defendant, which advances were misapplied. It was contended that the debentures were held by the executors of the estate as trustees and not as executors, upon the ground that all the known debts of the testator had long been paid, and on account of the lapse of time since the testator's death, and of the fact that they were named as trustees as well as executors in the will. It was held, however, that the debentures were held by them as executors, notwithstanding the lapse of time, because they had made no appropriation of them to the special purposes of the trust.

In *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465, the question came up upon a purchaser's objection to

Judgment.
Street, J.

a title to land which he had contracted to buy from executors under a will. The land was devised to the executors charged with the debts. The contract for sale was made ten and a half years after the testator's death; and it was held that where executors having the fee are selling real estate charged with debts a purchaser is not bound or entitled to inquire whether debts remain unpaid unless twenty years have elapsed from the testator's decease. In other words, a purchaser, until twenty years have elapsed, is entitled to assume that the executors are selling the land for the purpose of paying the debts.

See also *In re Ryan and Cavanagh's Contract*, L. R. 17 Ir. 42.

The result of these authorities seems to be that a sole executor, or all the surviving executors, of a deceased person may at any time within twenty years from the death of their testator sell or pledge any of the assets of the estate to any purchaser or mortgagee who has no notice of a breach of trust, and that the purchaser or mortgagee is under no obligation to make inquiry as to the destination of the purchase or mortgage money or to see to its application.

There are also authorities shewing that a pledge or mortgage of personal estate by one of several executors is subject to the same rule; but the cases to which I have referred have been cases in which the property transferred was of a character which passed by delivery: *Scott v. Tyler*, 2 Bro. C. C. 431; 2 Dick. 712; *McLeod v. Drummond*, 17 Ves. 152; *Ewart v. Gordon*, 13 Gr. 40; *Child v. Thorley*, 16 Ch. D. 151; Jones on Pledges, secs. 482 *et seq.*

With regard to trustees, however, there seems no rule which entitles a person advancing money to them to disregard the notice which is found in the mere description of trustee, that the person to whom it is applied is not absolute owner of the security which he proposes to pledge: *Bank of Montreal v. Sweeny*, 12 App. Cas. 617; *Sheffield v. London Joint Stock Bank*, 13 App. Cas. 333. In saying this, I do not desire to question the power of trustees to

make an absolute disposition of the securities they may hold as trustees, or the right of a purchaser to take and hold the securities without any obligation to see to the application of the purchase money, in cases to which sec. 8 of ch. 110, R. S. O., extends.

Judgment.

Street, J.

In the mortgages which were the subject of the pledge here in question, Wragg, the defaulting executor, is described as, "trustee of the estate and effects of the late James Cumming, deceased."

The defendants' manager in his evidence says that they dealt with him as trustee; that they never knew that he had any co-trustee; and, so far as he is aware, they never saw or had in their possession the probate or any copy of the will. In their statement of defence they do not set up that he was acting as executor in the transaction, but that he was the acting trustee of the estate.

It was pointed out upon the argument by the counsel for the defence, that in the will of the testator he describes the persons whom he appoints his executors as his trustees, even where he is imposing upon them duties strictly belonging to the office of an executor, as distinguished from that of a trustee; and it was strongly pressed upon us that the fact of Wragg being described in the mortgages as trustee makes no difference provided he really held them as executor. I can accede to this contention so far as this, that if Wragg had been a sole executor, and had held the mortgages as such, the fact that he had been described in them as trustee instead of executor would not render the defendants liable for his mis-application of a loan made upon the security of them; because the description would merely put them upon inquiry, and whether they inquired or not, they would not be chargeable with notice of any facts excepting those which existed, and those would have shewn him to hold the mortgages in a capacity entitling him to pledge them.

Under the will in question, however, there are certain duties which appertain to the executors as such, and certain others which appertain to them as trustees; and

Judgment.

Street, J.

when the defendants found securities, apparently of a permanent character, vested in one of the trustees named in the will, as a trustee, they were charged, *prima facie*, with notice of two facts: first, that these were securities which were held by Wragg as trustee, and not as executor; and, second, that he was committing a breach of trust in holding, in his separate name, securities belonging to a joint trust: *Lewis v. Nobbs*, 8 Ch. D. 591; *Lord Shipbrook v. Hinchinbrook*, 11 Ves. 252; *Langford v. Gascoyne*, *ib.* 333.

It is stated in *Willmott v. Jenkins*, 1 Beav. 405, cited with approval in *Ewart v. Gordon*, 13 Gr. at p. 47, that where an executor is also trustee the executorship does not cease until an appropriation to the trust of the securities affected by it has been made. Upon the face of these securities such an appropriation had been made, and there is nothing to shew the contrary.

Being put upon inquiry, as I think they were by the circumstances which I have pointed out, the defendants are chargeable with notice of the facts which, we must assume, they would have ascertained had they made inquiry; one of them being that the proceeds of the loan which they were asked to pay off had not reached the hands of the two trustees at all, and had not been applied to the purposes of the trust: *Jones v. Smith*, 1 Ha. 43; *Jones v. Williams*, 24 Beav. 47. Had these circumstances been actually known to them before they made their own advance, it is plain that they would not have taken a good title, and their constructive notice is equally fatal to their rights. It is no answer on their part that inquiry would have shewn that Wragg held the mortgages in his own name with the knowledge of his co-trustee. Had inquiries been made, it is possible that explanations would have been forthcoming enabling the defendants to carry out the transaction; but, unfortunately for them, we are not entitled to speculate as to possible explanations, and are bound to assume that the true facts would have been disclosed. See *Jones v. Williams*, 24 Beav. 47.

It was argued by one of the counsel for the defence that there was no proof given by the plaintiffs that the money raised upon the pledge of the mortgages in question had not been applied to the purposes of the estate.

Judgment.
Street, J.

The case, however, upon the onus of proof, seems to stand thus: if Wragg had power to mortgage, then the destination of the proceeds is immaterial; if he had no power to mortgage, then the onus is upon the defendants to shew that the proceeds were properly applied to the purposes of the estate.

The grant of probate to an infant along with a person who is of full age does not come within the prohibition to be found in (Imp.) 38 Geo. III. ch. 87, sec. 6, which is confined to cases where the infant is sole executor. See the cases upon this point cited in *Merchants' Bank v. Monteith*, 10 P. R. 334. The infant here attained his full age in 1876, and the grant to him along with Wragg, although made before that time, was not a nullity.

The question as to the effect of the recovery of judgment by the plaintiffs against Wragg for the full amount of the trust moneys which came to his hands, including, it is said, the amount advanced by him upon these mortgages, is raised by the statement of defence, and was mentioned but not strongly pressed upon the argument. It is, however, necessary to consider and dispose of it.

The nature of the claim against Wragg was a personal claim, and the judgment against him orders him to pay to the plaintiffs in the action the moneys of the estate which came to his hands. It is not suggested that these moneys have been paid or are likely to be paid. The claim in the present action is for the delivery to the plaintiffs of certain trust assets which have come to their hands. The two claims are as distinct in their character as those of a mortgagee against his mortgagor and an assignee of the equity of redemption. These are connected to this extent, that payment to the mortgagee of a personal judgment against the mortgagor would relieve the assignee of the equity of redemption from any further claim, but judgment against

Judgment. the mortgagor without satisfaction would certainly be no
Street, J. bar to an action by the mortgagee to recover the land from the assignee of the equity of redemption. There is nothing requiring the plaintiffs to make any election between their claim against Wragg and their claim against the defendants; on the contrary, the remedies might be concurrent and might have been obtained in the same action.

Then if there is no case for election, upon what other ground can the bar of the former judgment be set up? The personal action against Wragg has passed *in rem judicatam*, but not the claim against the defendants for delivery up of the mortgages or the money representing them; and it is clearly not a case for the application of the maxim *nemo debet bis vexari*.

The judgment must, therefore, be to declare that the defendants are trustees for the plaintiffs of the mortgages and the moneys secured thereby, and are bound to transfer the mortgages and to account for the moneys paid thereon.

The motion must be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

RE WILSON AND TORONTO INCANDESCENT ELECTRIC LIGHT
COMPANY.

Husband and wife—Conveyance to, in 1874—Tenants in common—Devolution of Estates Act—Conveyance of land by administrator—Debts.

Land was conveyed in 1874 to a husband and wife, who were married in 1864 :—

Held, that they took like strangers, not by entireties, but as tenants in common :—

Held, also, that the husband could by virtue of the Devolution of Estates Act, as administrator of the wife, and in his own right, make a valid conveyance of the whole of the land, although there were no debts of the wife to pay.

Martin v. Magee, 19 O. R. 705, distinguished.

PETITION by the above company under the Vendor and Purchaser Act, R. S. O. ch. 112, sec. 3, in respect of certain requisitions and objections arising out of a contract, made on the 7th October, 1890, between the company, the purchasers, and William Wilson, the vendor, for the purchase and sale and conveyance of the rear or east part of lot 36 on the west side of Major street in the city of Toronto. Statement.

The lands in question were conveyed to William Wilson and Ann Jane Wilson, his wife, on the 18th August, 1874. The marriage was in 1864, in Ireland, without any marriage settlement. Ann Jane Wilson died on the 14th August, 1887, without having made any will, and on 19th July, 1889, William Wilson took out letters of administration to her real estate. The deceased left no debts and no children.

The agreement was in writing, and was signed by William Wilson as administrator, as well as on behalf of himself.

The petitioners took the objection that one undivided half of the estate was vested in Ann Jane Wilson, and that it was necessary for her next of kin to execute the conveyance to the petitioners as representing the estate.

Statement.

The questions submitted were : (1) Under the deed of 18th August, 1874, what estate did William Wilson and Ann Jane Wilson take ; and upon the death of Ann Jane Wilson did William Wilson take the whole estate by survivorship as a joint tenant, or does the undivided half of the estate descend to the heirs-at-law and next of kin of Ann Jane Wilson ? (2) If the undivided half of the lands belong to the estate of Ann Jane Wilson, then, under the facts set out in the petition, can William Wilson, as administrator of Ann Jane Wilson, make a valid conveyance of her undivided interest therein, or will it be necessary for the next of kin of Ann Jane Wilson to execute the deed ?

The petition was argued before FALCONBRIDGE, J., in Court on the 5th December, 1890.

J. A. Paterson, for the petitioners. 1. The question is whether, under the conveyance to the husband and wife, the survivor takes the whole estate. Property acquired during the period from 2nd March, 1872, to 30th December, 1877, both inclusive, by a woman married at any time before 31st December, 1877, is separate estate : *Armour on Titles*, p. 252. This case is under 35 Vic. ch. 16 (O.). The change made by R. S. O. 1877 ch. 125, sec. 4, does not affect us, as the property was acquired before the Act of 1872 : *Furness v. Mitchell*, 3 A. R. 510. Since 1872 there is no right to take by survivorship. The question is not affected by *Re Shaver and Hart*, 31 U. C. R. 603, which was decided under different legislation. Whatever rights the married woman then had, she has superior rights now. *Re Jupp*, 39 Ch. D. 148, may seem to be against my contention, but it is really in my favour. The position now is the same as if the deed had been made to A. and B., strangers. The intention of the legislature was to increase the capacity of the married woman.

2. If I am right in my first contention, and the whole estate did not pass by survivorship to the husband, how is the separate interest of the married woman to be conveyed to the company ? By the deed of the administrator under

the Devolution of Estates Act? I say there is no authority Argument. for that unless there are debts of the deceased; and here there are none. I call for a deed from the next of kin of the wife. The administrator has the right to deal with the real estate only when it is needful to pay debts: *Martin v. Magee*, 19 O. R. 705.

Beverley Jones, for William Wilson, the respondent. The husband and wife took the estate by entireties, and the husband surviving is entitled to the whole estate, and can now convey as survivor. If not, he can make a good title under the Devolution of Estates Act. The Married Woman's Property Act was never intended to affect land tenures: *Leith's Williams*, p. 161. *Re Shaver and Hart* is a distinct authority in my favour. I refer also to *Dwarris on Statutes*, 2nd ed., pp. 564, 609. *Re Jupp*, 39 Ch. D. 148, overrules *Re March*, 24 Ch. D. 222; 27 Ch. D. 166. The deed was before the Act of 1884, so recent legislation does not affect us.

Upon the second question, I refer to *Re Reddan*, 12 O. R. 782, and to secs. 3, 4, 9, and 10 of the Devolution of Estates Act, R. S. O. ch. 108. It was the intention of the legislature to assimilate the law with regard to real estate to that with regard to personal estate. Nowhere in the Act is it said that the land devolves upon the personal representative solely for payment of debts. *Martin v. Magee* is not in point, being a decision upon a mere matter of conveyancing. I refer to *Williams on Executors*, 8th ed., pp. 633, 1272.

Paterson, in reply. Realty is not made identical with personality by the Devolution of Estates Act: *Re Nixon*, 13 P. R. 314.

January 16, 1891. FALCONBRIDGE, J.:—

The vendor and his wife, Ann Jane Wilson, were married in 1864.

The conveyance was made to them on 18th August, 1874. She died intestate on 14th August, 1887.

Judgment.
Falconbridge, J. The first question of title I am asked to pronounce on is, under the said deed of 18th August what estate did William Wilson and Ann Jane Wilson take, and upon the death of Ann Jane Wilson, as aforesaid, does William Wilson take the whole estate by survivorship, or does the undivided half of the estate descend to the heirs-at-law and next of kin of Ann Jane Wilson? i.e., have the Married Women's Acts destroyed the estate by entireties, and made the husband and wife tenants in common?

The particular phase of legislation affecting married women applicable to this case is the Married Woman's Property Act, 1872.

Re Shaver and Hart, 31 U.C.R. 603, was relied on as authority for the proposition that the husband and wife held, as before the statute, by entireties. The conveyance to husband and wife was made in 1836, and the only point considered in the judgment is as to the effect of the 4 Wm. IV. ch. 1, sec. 48 (Con. Stat. U. C. ch. 82, sec. 10), enacting that whenever by any assurance executed after 1st July, 1834, land shall be granted to two or more persons other than executors, etc., it shall be considered that such persons took or take as tenants in common, and not as joint tenants, unless an intention sufficiently appears on the face of such assurance that they shall take as joint tenants. The effect of the Married Woman's Act, Con. Stat. U. C. ch. 73, was argued by counsel, but is not even referred to in the judgment, probably because that conveyance was made before the Married Woman's Act, and would therefore not be affected by it, and *Re Shaver and Hart* is not therefore in point.

In *Griffin v. Patterson*, 45 U. C. R., Armour, J., says, at p. 554: " * * I think it might well be contended that the effect of the Married Women's Acts is to do away with the estate by entireties, and to make the devisees tenants in common."

The English case which is claimed as an authority on both sides is *Re Jupp*, 39 Ch. D. 148.

This case is at first sight an authority in favour of the

preservation of the estate by entireties, but on analysis it will not be found to be so. True, it decides that the rule of construction whereby under a gift to a husband and wife and a third person the husband and wife take only one moiety between them, has not been altered by the Married Woman's Property Act, 1882, but it stops far short of holding that whatever the wife does take she takes as of the same estate as before that Act. Kay, J., says, at p. 153: "* * as between her and the grantor she takes the same as before, but as between her and her husband what she takes is her separate property."

Judgment.
Falconbridge
J.

Then he criticizes *Re March*, 24 Ch. D. 222, and goes on: "In my opinion, as I have said, the capacity of a married woman to take property is only altered between herself and her husband. The true view seems to me to be that the wife had an unlimited capacity before the Act to acquire property, but that upon its acquisition the marital right of the husband gave him certain interests in it which the Act has interfered with." And he cites with approval what Lord Justice Cotton said in the Court of Appeal in *Re March*, 27 Ch. D. at p. 170: "In my opinion the Act was not intended to alter any rights except those of the husband and wife *inter se*."

In *Re March*, 24 Ch. D. 222, Chitty, J., had held the opposite view to that taken in *Re Jupp*, and the Court of Appeal reversed the judgment, because the will was made before the passing of the Married Woman's Property Act, 1882. See also *Re Dixon*, 42 Ch. D. 306.

If I correctly apprehend these cases, authority and reason point in one direction, and under a conveyance made to husband and wife in 1874 they take as strangers, *i.e.*, as tenants in common.

To hold otherwise would, I think, be to minimize the independent *status* intended to be conferred by the legislature upon the married woman.

It then becomes necessary to consider the second question, *viz.*, whether William Wilson, as administrator of said Ann Jane Wilson, can make a valid conveyance of

Judgment. her undivided interest, or whether it will be necessary for
Falconbridge, her heirs or next of kin to execute the deed.
J.

This depends on the construction of R. S. O. ch. 108, the "Devolution of Estates Act." The purchaser contends that, there being no debts, the administrator has no power to convey, and the vendor claims that the administrator of the wife takes the interest she had for distribution and can make a conveyance thereof.

The 4th section, sub-sec. 1, says that all such (*i.e.*, all real and personal) property "which is vested in any person * * * shall on his death * * * devolve upon and become vested in his legal personal representatives * * * and so far as the said property is not disposed of by deed, will, etc., the same shall be distributed as personal property * * * is hereafter to be distributed."

By section 5, the real and personal property of a married woman whereof she has died intestate shall be distributed as follows: one-third to her husband if she leave issue, and one-half if she leave none.

By section 9, the personal representatives shall have the right to dispose of and deal with the *real property* vested in them by the preceding sections of this Act, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were personal property vested in them.

By section 10, the personal representative shall in the construction of any instrument to which the deceased was a party, or in which he was interested, be deemed in law his heirs and assigns.

The object of this statute was plainly to assimilate, as far as possible, the conditions, succession, and mode of distribution of real and personal property. In the 4th and 5th sections, for the first time that I am aware of in any legal writing, is the expression "distributed" used in reference to real property.

In *Martin v. Magee*, 19 O. R. 705, the matters in question were matters of conveyancing and not of title, and it is laid down that where there are no debts, executors will

hold the bare legal estate for the devisee of the land of the deceased. I do not think it is a corollary of this proposition that the executor or administrator cannot convey where there are no debts. I do not say how it might be if the administrator, having no other interest, were arbitrarily endeavouring to sell against the wishes of the heirs, and without reason or necessity for selling, such as the existence of debts. Here the administrator has a beneficial interest, and the sale is necessary in lieu of partition or by way of distribution. So that I do not feel called on to hold, without an express provision to that effect, that the estate devolves on him only in case of debts, or for payment of them; and I refer "Subject as hereinbefore provided," in sec. 9, to the provisions for giving security, and for the protection of infants' estates.

Judgment.
Falconbridge,
J.

The administrator can make a valid conveyance.

In order that the purchaser may be under no apprehension as to the application of the purchase money, I shall direct the purchase money to be paid into Court to the credit of this matter, to be paid to the persons who shall be declared to be beneficiaries thereof.

[CHANCERY DIVISION].

BOYD V. ROBINSON.

Principal and surety—Bond of indemnity—Actual damage—Judgment recovered against obligee but not paid—Indemnity—Dissolution of partnership—Payment into Court.

The defendants, husband and wife, executed in favour of the plaintiff, the husband's retiring partner, a bond conditioned to be void if the husband should save, defend, and keep harmless and fully indemnify the plaintiff from all loss, costs, charges, and damages, and expenses which he might at any time sustain, or suffer, or be put to for or by reason of non-payment by the husband of the liabilities of the firm as the same became due, it being the intention and the plaintiff was thereby "indemnified or intended so to be from all and every liability of every nature and kind soever of the said firm."

Judgments were recovered by creditors of the firm against them and the plaintiff now sued the defendants to recover the amount to pay these judgments, although he had not himself paid them :—

Held, that he was entitled to have the judgments and costs paid and the amounts necessary were for that purpose ordered to be paid into Court by the defendants.

Decision of ARMOUR, C.J., reversed.

Statement.

THIS was an action brought by John Boyd against Edwin Robinson and Mary Robinson, claiming \$6,000 under a bond.

In his statement of claim, the plaintiff set out that he was a roofer, and that up to about August 27th, 1889, he and Edwin Robinson carried on business in Toronto in partnership, under the name of Robinson and Boyd; and that on or about the last mentioned day, he, the plaintiff, going out of the partnership business, and Edwin Robinson remaining in to carry it on, it was agreed, among other things, that the two defendants were to indemnify him against any claim which might thereafter be made upon him in connection with the partnership business to be thereafter carried on by Edwin Robinson; that in pursuance of the said agreement, the defendants by their bond under seal, dated August 27th, 1889, became bound to him, the plaintiff, in the penal sum of \$6,000, subject to the following condition :

"The condition of the above written bond or obligation is such that if Statement the said Edwin Robinson shall well and faithfully carry out and perform all contracts of the firm of Robinson and Boyd now in force, as well as all contracts into which he may hereafter enter in pursuance of tenders of said firm now outstanding ; and shall, from time to time, and at all times hereafter, well and truly save, defend, and keep harmless and fully indemnified the said John Boyd, his executors and administrators, from and against all loss, costs, charges, damages, and expenses which the said John Boyd, his executors and administrators, or any of them, may at any time or times hereafter bear, sustain, or suffer or be put to, for, or by reason of the non-payment by the said Edwin Robinson of the liabilities of the said firm of Robinson and Boyd, when and as the same become due and payable, or by reason of any breach or non-performance of any contract of the said firm, or on which the said Boyd is or may become liable as a member of the said firm, it being the intention, and the said John Boyd is hereby indemnified, or intended so to be, from all and every liability of every nature and kind soever of the said firm of Robinson and Boyd, then this obligation to be void, otherwise to be in full force and effect : "

that the defendant failed to pay the liabilities of the firm of Robinson and Boyd as they became due, and for which the plaintiff was liable, and divers of the creditors of the firm brought action against the plaintiff, and recovered judgment against the plaintiff and issued execution thereon.

By their defence the defendants set up various charges of false and fraudulent representations on the part of the plaintiff not necessary to be mentioned here, and referred to the agreement of dissolution of August 27th, 1889, the sixth paragraph of which was as follows :

"As security for his due performance of firm contracts, and as an indemnity to the said Boyd against any liability arising in respect thereof, and for all outstanding liabilities of the said firm, the said Robinson will give a bond in which his wife will join."

The action came on for trial at the Toronto Autumn Assizes upon September 5th, 1890, before ARMOUR, C. J., who gave judgment as follows :

"I think the bond is only an indemnity, and that being so, the plaintiff not having paid anything he cannot recover, and the action must therefore be dismissed."

The plaintiff now moved before the Divisional Court by way of appeal from the above judgment on December 16th, 1890, before BOYD, C., and MEREDITH, J.

Argument.

J. Macgregor, for the plaintiff. Two judgments were recovered against the plaintiff, and the question is, whether this is sufficient, without actual payment. We contend that it is: *Smith v. Teer and Wilson*, 21 U. C. R. 412; *Loosemore v. Radford*, 9 M. & W. 657; *Warwick v. Richardson*, 10 M. & W. 284; *Carr v. Roberts*, 5 B. & Ad. 78; *Rodgers v. Maw*, 4 D. & L. 66; *Oakeley v. Pasheller*, 4 Cl. & F. 207; De Colyar on Guarantees, 2nd ed., at p. 276; *Ranellaugh v. Hayes*, 1 Vern. 190; *Nesbit v. Smith*, 2 Bro. C. C. 579, 582; *Wooldrige v. Norris*, L. R. 6 Eq. 410, is very near this case. *Lacey v. Hill*, *Crowley's claim*, L. R. 18 Eq. 182, 191; *Hobbs v. Wayet*, 36 Ch. D. 256; *Hughes-Hallett v. Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561.

Shepley, Q. C., for the defendant Mary Robinson. The question is as to the liability of Mrs. Robinson on this bond. As between Boyd and Robinson, Robinson was alone liable for the debts, Mrs. Robinson was under no obligation to creditors at all until execution of the bond. No doubt a surety could file his bill *quia timet* against the principal debtor to be exonerated from payment of debts. This rested on the equities arising from the relation of the parties, and not on express contract. All these cases were cases where there was a privity between the surety and the creditor. Where the relationship is complicated by the introduction of a stranger as surety to the surety, his liability must be measured by the express contract: Harris on Subrogation p. 552, sec. 802. In *Wooldrige v. Norris*, L. R. 6 Eq. 410, the difference as to the two classes of cases is shewn. On the strict wording of the contract which the defendant had entered into in that case, there had been a breach: *Smith v. Teer and Wilson*, 21 U. C. R. 412, does not go any farther. The contract is simply to indemnify the plaintiff from any loss he has been put to. He has not been put to any loss. *Penny v. Foy*, 8 B. & C. 11, shews the difference between this case and one in which the covenant by the surety was to pay the money.

January 19th, 1891. BOYD, C. :

Judgment.

Boyd, C.

In *Smith v. Howell*, 6 Ex. 730, Platt B., says: "The covenant is to save the plaintiff harmless from the costs, damages, and expenses, which might be *incurred*. When does that liability arise? Surely when the demand is actually made. The plaintiff, therefore, may maintain his action, though he has not himself as yet paid any of these charges," p. 739. One part of the covenant here is "to save, defend, and keep harmless and fully indemnified from and against all loss, costs, charges, damages, and expenses which the plaintiff may bear, sustain, suffer, or be put to, for or by reason of the non-payment by Robinson of the liabilities of the firm."

In commenting on these cases, it is said in *Mayne on Damages*, 4th ed., 307, judgment actually recovered against a party is always a damnification to the full amount for which it is given, even though payment has not been made under it. The strict construction of these contracts to be found in some earlier cases limiting to recovery for actual damage, is not now to be commended, when the Court can so mould its judgments as to secure the application of the proceeds of the judgment to the person ultimately entitled to receive them, as was done in *Cunningham v. Lister*, 13 Gr. 575, and *Canavan v. Meek*, 2 O. R. 636, 638.

I am not able to distinguish in any material point *Smith v. Teer and Wilson*, 21 U. C. R. 412, from the present case. The language of the bond of indemnity is as comprehensive in the one case as the other, and the fact of a third person having joined with the chief debtor to secure the surety who claims relief, exists there as here. Judgment has here been recovered against the plaintiff in respect of debts and liabilities which he was indemnified against by the defendants' joint bond, and though he has not paid anything, the condition of the bond has been broken, and he is entitled to recover the amount of the judgments. The failure to pay the liabilities as they accrued, and the fact

Judgment. that judgments have been recovered against the plaintiff are both breaches of the bond. The judgment, however, should be so shaped as to protect the plaintiff and satisfy the creditors; and it should, therefore, be to pay the amount of the judgments into Court, and to pay the costs of this litigation to the plaintiff.

Boyd, C.

MEREDITH, J. :—

The defendants are husband and wife. The plaintiff was taken into partnership by the husband, in the business of roofers, and, after carrying on that business, in such co-partnership, for about nine months, the husband became desirous of getting rid of the plaintiff, and an agreement, by which the plaintiff was to retire, was come to, and was put in writing. The sixth paragraph of that agreement is in these words:

[The learned Judge then set out the paragraph in full.] And this seems to be the only provision contained in it for the payment of the debts of the concern; from which the plaintiff was to be relieved.

By bond, of the same date, and drawn at the same time as the agreement, the defendants became jointly and severally bound to the plaintiff in the penal sum of \$6,000; the condition of the bond being in these words:

[The learned Judge then read the condition, emphasizing the concluding words: "it being the intention, and the said John Boyd is hereby indemnified, or intended so to be, from all and every liability of every nature and kind soever of the said firm of Robinson and Boyd."]

Subsequently the plaintiff and the husband were sued together for debts of the firm, and judgments were recovered against them for \$824.24 and \$132.88, besides costs of actions, \$36.24 and \$34.36.

The husband did not defend, but the plaintiff did, and the judgments were obtained against him on motion under Con. Rule 739; and he was of course put to the costs of his defence in each action.

There was, therefore, a breach of the condition of the bond in this respect; and I think also a breach of it in permitting the action to be brought and judgment recovered, as it can hardly be said that a tradesman, in these days, against whom an action is brought and judgment recovered, apart from the consequent writs of execution and levy, or attempted levy, under them, does not sustain or suffer damage by reason thereof.

As to what are damages, see Stroud's Judicial Dictionary title "Damages," and cases there collected.

seems to me, also, that, in view of the surrounding circumstances, the condition, taken altogether, means that the defendants will pay all and every liability of the firm when and as they become payable, and save the plaintiff from further concern over them; that such was the intention of the parties, even if somewhat obscured by the draftsman following more closely than needful some form of indemnity bond, and therefore that there was a breach of the condition as each debt became payable and remained unpaid; a breach, which, at common law, would have given the plaintiff the right to recover from the defendants the whole amount of the judgments, though he has paid nothing: *Spark v. Heslop*, 1 E. & E. 563; *Smith v. Teer and Wilson*, 21 U. C. R. 412; *Penny v. Foy*, 8 B. & C. 11. But see *Gray v. McMillan*, 22 U. C. R. 456, which does not seem to be in accord with these cases.

The plaintiff is also, in my opinion, entitled to relief upon the principle of equity, that a person indemnified against loss, as the plaintiff was, is not obliged to wait until he has suffered, and perhaps been ruined, before having recourse to judicial aid. If the plaintiff have not already sustained actual loss, by reason of the actions brought and judgments recovered against him, loss is so imminent that he ought to have relief: *Lindley on Partnership*, 5th ed., 375; *Wooldridge v. Norris*, L. R. 6 Eq. 410; *Lacey v. Hill*, *Crowley's claim*, L. R. 18 Eq., at p. 191; *Hobbs v. Hays*, 36 Ch. D. at p. 259.

In *Hughes-Hallett v. Indian Mammoth Gold Mines Co.*

Judgment. 22 Ch. D. 561, the plaintiff *had not been called upon to pay*, and for all that appeared, *might never be called on*.
Meredith, J.

In *Edwards v. Argentine Loan and Mercantile Agency Co., &c.*, 63 L. T. N. S. 364, the plaintiff could be sued only in the Argentine Republic, and might have a good defence to an action there.

These cases tend perhaps to prove rather than subvert the rule.

The judgment moved against, should be set aside, and judgment directed to be entered for the plaintiff. There is no difficulty in moulding a judgment to meet the requirements of the case and protect all parties; and the machinery of the Court is now quite sufficient to work out such a judgment. The plaintiff should have the costs of the action and of this motion, and of the reference, which should be to the local Master.

A. H. F. L.

[CHANCERY DIVISION.]

WATEROUS ENGINE WORKS COMPANY V. THE CORPORATION OF THE TOWN OF PALMERSTON.

Municipal corporations—Executory contract for purchase of fire-engine—Necessity for by-law—Contract under seal—Acceptance of bill of exchange for price—R. S. O. 1884, ch. 184, secs. 480, 630—52 Vict. ch. 36, secs. 20, 40.

A contract for the purchase of a steam fire-engine which remains executory in the sense that no acceptance of the engine has taken place, cannot be enforced against a municipal corporation unless a by-law authorizing the purchase has been passed, under the Municipal Act, R.S.O. 1887, ch. 184, secs. 480, 630, as amended by 52 Vict. ch. 36, secs. 20, 40, even although the contract to purchase is under the corporate seal and a bill of exchange for the price has been accepted by the mayor. Decision of ROSE, J., affirmed.

THIS was an action brought by the Waterous Engine ^{Statement.} Works Company to recover from the defendants \$2,150, and interest, as the price of a fire engine alleged to have been purchased by the defendants from the plaintiffs under a contract dated May 19th, 1890, the plaintiffs also setting up a bill of exchange drawn by them on the defendants on July 31st, 1890, for the price of the engine, and accepted by the mayor of the defendants' corporation, but not paid at maturity.

The defendants in their defence besides denying the contract, and setting up other defences, also alleged that the engine in question had not satisfied the tests provided for in the contract of sale: that the mayor had no lawful authority to accept the draft, and therefore that his acceptance was not binding on them, and was moreover contrary to resolutions passed by the defendants' council, of which the plaintiff had notice: that the plaintiffs' claims were in respect to a debt or debts incurred in the year 1890, and not within the ordinary expenditure of the defendants' corporation during that year, but no estimate was made by the defendants, nor any assessment or levy made for payment of such debt, nor any by-law passed by the defendants' corporation for the creation of such debt, nor

Statement. for imposing a rate for payment thereof, and the defendants had not now, nor at the commencement of the action any moneys out of which to pay the said alleged debt.

The action came on for trial before ROSE, J., and a jury, at Brantford, on November 3rd and 4th, 1890.

ROSE, J.—The defendant corporation on April 12th, 1890, passed a resolution recommending that the fire and water committee to ask for the lowest price and terms from the plaintiff company or other company for a fire engine.

The committee on May 19th, following, reported recommending the purchase of a steam engine and 500 feet of hose, price not to exceed \$2,150. This report was received and adopted.

On June 2nd, the committee reported that they had purchased an engine and hose from the plaintiff company, which report was received and adopted. A contract under seal was entered into between the plaintiff and the defendant corporation dated May 19th, and signed by the mayor as mayor and chairman of the fire and water committee, and witnessed or signed by the clerk, it does not appear very clear which, to which contract the corporate seal was affixed. This contract was before the council so it is said, when the proceedings in council of June 2nd, were taken, although it is probable that the paper on which the seal of the corporation is found was not before the council, but only a copy of the contract.

At the meeting of June 2nd, the council appointed a committee to engage experts to watch and report on the working of the engine on the day of the test. This test was pursuant to the tender of the plaintiff company which was annexed to and made part of the contract. The provision was that the company should submit the engine to any and all tests that the corporation might deem necessary, and that if the test proved satisfactory, and the engine was found to be manufactured in accordance with the specifications, the price should become payable.

Judgment

Rose, J.

On June 19th, the test was made, and on June 20th, the experts reported that the engine fully came up to the specifications of the contract with the exception as to the time taken to get up steam and throw water which was eleven and a half minutes. The contract specified ten minutes as the limit. But the experts reported that this could be partly accounted for by the fact that 600 feet of hose were attached, whereas the contract specified 100 feet.

As to this, on the evidence, I find as a fact that the engine did answer the test, and did fully comply with the contract, and was capable of getting up steam and throwing water within the ten minutes specified as the limit. Upon this report being laid before the council a committee was appointed to seek for legal advice, and on July 2nd at a special meeting of council, it was reported that the solicitors advised that there was no binding contract.

This report was formally received by resolution, and on July 21st a resolution was passed that all negotiations with reference to the fire engine with the plaintiff be dropped, "or at least so far as this council can legally do so, and that they be notified to remove the engine from the town hall; and further, that a copy of this resolution be forwarded to the Waterous Engine Works Company, properly attested with the signature of the mayor and clerk, with the corporation's seal attached thereto." Within a day or two a copy of this resolution so verified was sent to and received by the plaintiffs or their solicitors, and acknowledged on August 6th.

I am not able to say upon the evidence that the corporation accepted the engine. It was necessarily forwarded to the town of Palmerston for the purpose of a test and was placed in the engine house, but beyond that I am not aware that any use was made of it, or that the corporation had any control over it. The report did not in terms approve of the engine by reason of the exception to which I have referred, and the action of the council upon that report cannot be construed to be an acceptance.

On July 31st, the company drew upon the corpora-

Judgment. tion for the contract price. The draft was accepted by
Rose, J. the mayor for the corporation, but was subsequently
 protested for non-payment.

I do not think this draft put the matter in any different position than it would have been if it had not been drawn and accepted, because if the corporation was not liable prior to the acceptance of the draft, it is clear that the draft was accepted by the mayor after the council had determined not to carry out the contract or pay the price. As in the case of *Silsby v. The Corporation of the Village of Dunnville*, 31 C. P. 301, 8 A. R. 524, the company seems to have been treated very badly.

I have, however, to determine on the law whether there was a contract binding upon the corporation which the Court can enforce. The power to purchase an engine, it was argued by the plaintiff, was given by section 480 of the Municipal Act, R. S. O. 1887, ch. 184. It was argued, however, by the defendant that the power to purchase under that section was only given within the limitations provided by that section, that is to say, where the council was contracting with the waterworks or water company. Some doubt may be thrown upon the exact force of section 480 by reason of the amendment to section 630 by section 40 of 52 Vict. ch. 36, section 630 being made to read that the council of an incorporated village may pass by-laws for the purchase of fire engines and supplies. If section 480 gave a general power, this amendment perhaps was not necessary.

But I do not think it is necessary to discuss this question, because if the power was given by section 480, I think it was a power which must be exercised by by-law, under section 282 of the Municipal Act; and I am of this opinion notwithstanding the difference pointed out between the opening words of sections 479 and 480, section 479 giving the power to pass by-laws for the purposes therein mentioned, and section 480 giving the power to make purchases without referring to by-laws.

I think, therefore, this contract was one which it was

necessary to make under the provisions of a by-law. Having regard to the case of *Silsby v. The Corporation of the Village of Dunnville, supra*, I cannot say that this was a matter of such trifling amount, or so ordinary and unimportant as to render unnecessary a by-law, but I think it was extraordinary, unusual, and important. If there was no power to make a contract except in pursuance of a by-law, it is clear that the affixing of the seal to the contract gave it no greater validity. See *The Governor and Company of the Bank of Ireland v. The Trustees of Evans Charities*, 5 H. L. Cas. 389, and *Mayor, &c., of the Staple of England v. The Bank of England*, 21 Q. B. D. 160. As I have been unable to find any acceptance of the work, I cannot say that this is other than an executory contract, so that the decision in *Robins v. The Municipal Corporation of the Town of Brockton*, 7 O. R. 481, does not assist the plaintiff.

Judgment.
Rose, J.

The resolutions coupled with the contract under seal, do not, in my opinion, meet the requirements of the statute as to a by-law. See *Gutta Percha Rubber Manufacturing Co. v. The Corporation of West Toronto Junction*, a decision of my brother MacMahon in July last not reported.* The case thus rests upon an important contract, unauthorized by by-law, without acceptance of the work done, and I fear therefore that this contract is not binding upon the corporation, and that the plaintiff has failed in the action. Were it not for the action of the Court with respect to costs in *Silsby v. The Corporation of the Village of Dunnville*, 31 C. P. 301, I should be inclined to dismiss the action without costs, because I

* In *Gutta Percha Manufacturing Co. v. The Corporation of West Toronto Junction*, tried before MacMahon, J., at the Toronto Spring Assizes, April 15th, 1890, a resolution of the municipal council under the signature of the mayor and corporate seal, which adopted a resolution of the Fire, Gas, and Police Committee of the council accepting the tender of the company for 2,000 feet of fire hose at \$1.10 a foot, was held not to be equivalent to the passing of a by-law by the council for a similar purpose, and that the company could not recover the price. The council had not taken delivery of the hose, having refused same.

Judgment. cannot but view the conduct of the corporation as not to be commended. The plaintiff has expended much money and supplied an engine in accordance with the terms of contract, and now finds itself helpless to enforce the provisions of the contract. I suppose it will be said that it was the duty of the plaintiff as against the ratepayers to see that the provisions of the Municipal Act were complied with before entering upon the work. This may be so; at any rate I feel that I am unable to relieve the plaintiff, and the action must, in my opinion, be dismissed with costs.

Rose, J.

The plaintiffs now moved before the Divisional Court by way of appeal from this decision, and the motion was argued on December 16th, 1890, before BOYD, C., and MEREDITH, J.

A. J. Wilkes, Q.C., for the motion. Here there was a formal contract under seal, which we say distinguishes the case from that of *Silsby v. The Corporation of the Village of Dunnville*, 31 C. P. 301. There was no actual by-law. ROSE, J., held under sec. 282 of the Municipal Act, R. S. O. 1887, ch. 184, that a by-law should have been passed before the contract. We say the "powers of the council" in that section do not mean a contract, but such overt active powers as expropriating a road: Harrison's Municipal Act, 5th ed., p. 208. Since *Silsby v. The Corporation of the Village of Dunnville*, 31 C. P. 301, 8 A. R. 524, a new section has been introduced into the Municipal Act, which it was contended did away with the effect of that case namely, the present sec. 480 of that Act. Sec. 479, the previous section, expressly states what may be done by by-law. If a by-law is necessary we ask the Court to compel the passing of a by-law. But may not the contract be considered a by-law? A by-law need not be necessarily in any particular form. A resolution under seal has been construed as a by-law. I venture to say no municipality ever passed by-laws simply to authorize the doing of a ministerial act such as executing

a contract by the mayor: *Green v. Corporation of the Township of Orford*, 15 O. R. 506, 16 A. R. 4, is a strong case in our favour; *Robins v. The Municipal Corporation of the Town of Brockton*, 7 O. R. 481, may also be referred to. Sec. 480, is equal to a by-law, a general by-law passed by the Legislature itself. I refer also to *Quaintance v. Corporation of the Township of Howard*, 18 O. R. 95. A municipal corporation moreover is bound by its acts just as an individual is, and having gone a certain length is estopped from setting up the want of the by-law. Moreover the engine was necessary for the purposes of the municipality, and came under the head of ordinary expenditure.

A. M. Clark, contra. The cases cited for the plaintiffs are distinguishable in this, that here the contract is executory. The defendants have refused to accept the engine. Our defence is not purely technical. The ratepayers object to the hasty manner the contract was entered into. The corporation are only trustees for the ratepayers, and therefore it is that a corporation shall not do work of importance except by by-law. Thus the ratepayers could know what is being done. Far less important things than the purchase of a fire engine such as this have to be done by by-law. There is a distinction between power to purchase given to a corporation, and the responsibility of creating a debt. Here it would have been necessary to create a debt.

January 19th, 1891. BOYD, C. :—

Section 480 of the Municipal Act, R. S. O. ch. 184, was amended by 52 Vict. c. 36, sec. 20, and sec. 630 of the same Revised Act was amended by 52 Vict. ch. 36, sec. 40. I think both sections as amended, are to be read together, and it plainly follows from the very words used, that the power to purchase fire engines by incorporated villages as well as other municipal bodies, is to be exercised by by-law. That is also in conformity with the whole scope of muni-

Judgment.
Boyd, C.

cipal law, which contemplates generally that the powers of the council shall be exercised in this formal way : sec. 282. In other respects, I agree that this case is concluded by authority, and the only argument open to the appellants was to contend that some change had been wrought by the recent legislation above referred to. On this point, I am against them, and therefore think the judgment should be affirmed with costs.

MEREDITH, J. :—

I do not think that the proper determination of this case is settled by the *Silsby Case*, 31 C. P. 301, 8 A. R. 524; although alike in many of their circumstances, they are quite unlike, the opposite of one another, in the very fact upon which the *Silsby Case* was decided. There there was no contract under seal. Here there is a contract under seal; and that contract was fully executed on the part of the plaintiffs. The want of the seal was the ground of the decision in the *Silsby Case*, following *Hunt v. Wimbledon Local Board*, 3 C. P. D. 208, S. C. in App. 4 C. P. D. 48, in England, which has since been approved by the House of Lords in the *Royal Leamington Spa Case*, 8 App. Cas. 517. But it is worthy of remark that those cases were decided under an Act expressly providing that every contract exceeding £50 in value or amount, shall be in writing and sealed with the common seal; and the judgments in those cases are based upon that provision. There is nothing of that kind in the Municipal Act; and the only statutory provision seeming to expressly give to municipal corporations power "to contract and be contracted with," is that contained in the Interpretation Act, R. S. O. 1887, ch. 1, sec. 8, sub-sec. 25.

It was contended that there was no contract under seal here, because the seal was not affixed in open council. But even if that were necessary, looking at the whole proceedings of the council as shown in the minutes of their meetings, the reports of their committee, and the testimony

of their clerk, and especially at the fact that, after this contract had been entered into and executed under the direction of the council, a copy of it was produced and read in open council, and the report of the committee upon it received and adopted without dissent, and a committee then appointed so that the tests provided for in it might be made in accordance with its terms, there would have been such an approval and ratification of the contract as to make it binding upon the council.

Judgment.
Meredith, J.

There was clearly a contract in writing, and under the corporate seal of the defendants, made by their council. A contract, on the plaintiffs' part, not merely to sell, but, according to the plaintiffs' proposal which is incorporated with the agreement, "to manufacture for your town and ship the same within thirty days after receiving notice of the acceptance of this proposal"; and, although the contract might have been filled by supplying a ready made engine of their own manufacture, according to the testimony of the witness Charles H. Waterous, this particular engine was made or fitted up for these defendants; it was delivered free on board the cars at Palmerston, within the time limited by the proposal and agreement; and, according to the findings of the trial Judge, not moved against, "answered the tests" provided for in the proposal, and "fully complied with the contract"; so that, if this be a contract binding upon the defendants, it has been fully executed by the plaintiffs on their part, the time for payment, sixty days from the delivery free on board the cars at Palmerston, has elapsed, and the plaintiffs are entitled to payment.

But this does not end the case. There are yet obstacles in the plaintiffs' way quite as formidable as the want of the seal in *Silsby's Case, supra*; and, in my opinion, the judgment moved against must be affirmed by reason of them.

In my judgment the council had no power to make the contract in question for two reasons: (1) The want of a by-law providing for the acquiring of a steam fire engine, and authorizing the making of the contract in question;

Judgment. and (2) because it incurred a debt which that council, without, at least, a by-law, had no power to incur.
Meredith, J.

(1) It is provided by section 8 of the Act R. S. O. 1887, ch. 184, "that the powers of every body corporate under this Act, shall be exercised by the council thereof;" and, by section 282, that "the powers of the council shall be exercised by by-law when not otherwise authorized or provided for," provisions more imperative than those under consideration in the *Wimbledon* and *Royal Leamington Spa Cases*, *supra*.

The acquiring of a steam fire engine, such as that in question, for a town such as Palmerston, under 1,700 inhabitants, involved much more than the mere question of the making of the contract to purchase, or any matter connected with the contract itself. Unless section 480 of the Act make it otherwise, it would seem to me to be clear that it is one of those powers which the Act expressly requires shall be exercised by by-law. It would be a different matter if it were something which the law requires the municipality to provide for, if it were not a matter in which the discretion of the council must be exercised; such as, for instance, the provision for reward for apprehension of horse thieves: section 494.

It has been contended that this is a mere technical obstacle which the Courts ought to wipe away, a mere matter of form, because, it is said, the council that made this contract had power to pass, and would have passed the necessary by-law, at the meeting when the contract was ratified, if it had been asked for, or thought to have been necessary; and there is every reason to suppose that this council would then have done anything in their power to make binding the contract in question; and, if it were such a mere matter of form, that would add much weight to the contention that a by-law is not necessary; but it is not so, for, under sec. 283, the council may make regulations for governing their proceedings, and, it is said, have made such regulations as prevent the passing of a by-law hastily, and give members of the council, who may be absent at one

meeting, an opportunity of being heard at another meeting, Judgment. before any by-law is passed, safeguards against hasty Meredith, J. action in matters of this kind; and, the more important consideration, the right to move to quash the by-law given by the Act is taken away if the passing of a by-law (and of course if a by-law a resolution or order) can be dispensed with. I know of no reason for any effort, in these days, to curtail the safeguards of ratepayers, or extend the powers of members of councils; nor any good cause for finding fault with the well established rule that persons dealing with others who have only limited powers must see to it that such dealings are within such powers.

Then, does section 480 give "every municipal council" power to make such a contract as this without any by-law in any way authorizing it? Is the "power" to purchase here given not one of the "powers" which, under section 282, must be exercised by by-law? Or is it here otherwise authorized or provided for?

The original of this section seems to be sec. 7 of ch. 23, 45 Vict. (1882), Ontario, introduced as an amendment, by way of adding two new sub-sections, to section 349 of the Municipal Act, R. S. O. 1877, ch. 174, that section being one of the group, Division VII., of the Act, headed, "*By-laws respecting Yearly Rates*;" and the section, and these added sub-sections, all giving powers of such importance that it could never have been the intention of the legislature that they might all be exercised with less formality than the appointment of a pound keeper, or the many less important powers, which can be exercised only by by-law. As to the effect of the grouping and headings of sections, see *Eastern Counties, &c. R. W. Co. v. Marriage*, 9 H. L. Cas. 32, and *Wood v. Hurl*, 28 Gr. 146.

There seems to have been no express provision in the Act, before this amendment, for the acquiring of fire engines, and the intention seems to have been to remove any possible ground for questioning the power to do so.

The omission of the usual words, "may pass by-laws," from the section in question, or the adding of it to section

Judgment. 349, instead of some of the sections beginning with those words, has given occasion for an argument against the necessity for a by-law; but, although it may be that the words of the section are not well chosen in view of the general wording of the Act, or that the section has not been skilfully grafted into the Act—things quite possible among the very many amendments continually being made—I am clearly of opinion that this section does not give power to make such a contract as this, without any by-law; that the “power” to purchase there given, is one of the “powers” which, under section 282, must be exercised by by-law; and that it is not otherwise authorized or provided for; and the contract is therefore invalid.

In my opinion, there should have been a by-law passed providing for the acquiring of a steam fire engine, approving of the proposed agreement, and directing or authorizing the execution of the contract; and the execution of it accordingly need not have been in open council. See sections 405 and 288 of the Municipal Act, the former expressly providing for the manner in which instruments duly authorized are to be executed on behalf of a municipal corporation, and the latter likewise providing for the authentication of its by-law.

(2) It is clear from the evidence that the debt which would have been incurred by this contract, was one which could have been met only by raising money “not payable within the municipal year;” and therefore required a by-law and the assent of the ratepayers.

It is apparent that it could not have been met by appropriating the fund \$2,100, referred to in the Act, 53 Vict. ch. 98, (1890), Ont., for a large portion of that had already been expended for the general purposes of the corporation, and, in any case, it could, under that Act, be appropriated only by by-law “and not otherwise;” and, I think must have been so appropriated before the making of the contract; without that there was no surety of the by-law being passed at all; the events that have happened indicate that it would not. There is no resolution or other proceeding of

the council even indicating any intention to so appropriate these moneys, though, from all the circumstances, one must conclude that it was in the minds of the persons interested that the money was to come from that source. Judgment.
Meredith, J.

It was not contended, on this argument, that the acceptance, by the mayor, of the bill of exchange referred to in the pleadings and evidence gave the plaintiffs any good ground of action. I do not see how it could be. I am not aware of any power in the defendants to accept such a bill as this; and, if there were it was not accepted by them. See sections 244 and 413 of "The Municipal Act."

I am unable to perceive any great hardship in this to the plaintiffs, the contract has not been executed, as it has been called, in the sense of the plaintiffs having given, and the defendants having taken, the benefit of it so that there can be no restitution; the engine remains practically as good as when delivered, and can be had again for the taking of it by the plaintiffs. The plaintiffs are a corporation too. It is not too much to expect their officers to ascertain how they are to be paid, and to see whether means have been lawfully provided for their payment, before entering into a contract of this kind. They are not like Silsby, a foreigner, unacquainted with the law of this Province; nor have they been put to the expense, loss, and annoyance that he was put to. Indeed they have only themselves to blame for any expense and loss they have been put to in not taking the ordinary precautions of a prudent vendor, for being, perhaps too anxious to sell, and too fearful of their rival's competition to protect their own interests.

I think the motion should be dismissed with costs.

[This case is to be taken to the Court of Appeal.—REP.]

A. H. F. L.

[CHANCERY DIVISION.]

FULLER v. ANDERSON.

Will—Construction—Words of limitation in tail applied to personally.

A testator bequeathed personal estate to his wife, "to have and to hold unto her and the heirs of her body through her marriage with me, their, and each of their sole and only use forever" :—

Held, that the wife was entitled to the personalty absolutely, there being nothing to show that the testator meant that the words, "heirs of her body, through her marriage with me," should impart anything different from their ordinary, natural meaning.

Crawford v. Trotter, 4 Madd. 361, distinguished.

Statement THIS was an action for the construction of the will of Hugh Thomson Magill.

The facts of the case and provisions of the will are sufficiently set out in the judgment.

The matter came up on motion for judgment on January 28th, 1891, before ROBERTSON, J.

M. K. Cowan, for the plaintiff.

J. Hoskin, Q.C., for the infants.

Hoyles, Q.C., for defendant Anderson.

The following authorities were cited: Hawkins on Wills, 2nd Am. ed., p. 188; Theobald on Wills, 3rd ed., p. 348; *Re Banquier Trusts*, 52 L. J. N. S. 565; Williams on Executors, 8th ed., pp. 1111-2; *Crawford v. Trotter*, 4 Madd. 361; *Jesson v. Wright*, 2 Bli. 1.

January 30th, 1891. ROBERTSON, J. :—

Motion for judgment in an action for the construction of the will of the late Hugh Thomson Magill, bearing date February 14th, 1887. The testator died on 16th day of same month. The plaintiffs are his executors. The defendant Ellen Cedar Anderson, is his widow, and the defendant Grace Myrtil Magill, is the posthumous child of the testator and is an infant, of about the age of three years.

The property of the testator consisted wholly of personalty and the plaintiffs have administered and have duly accounted to the Surrogate Court, and there remains in their hands in money and securities \$2,266, for distribution, and doubts having arisen as to the proper distribution of the assets in their hands under the following paragraph of the will, this action is brought for a declaration in regard thereto: Judgment.
Robertson, J.

"I give, devise and bequeath all my real and personal estate of which I may die possessed to Ellen Cedar who was married to me on the fourth day of March, one thousand eight hundred and eighty-six, together with all money, security for money, or other real and personal estate of whatsoever kind I may possess at the time of my decease, to have and to hold unto her and the heirs of her body through her marriage with me, their and each of their sole and only use forever."

In *Williams v. Lewis*, 6 H. L. Cas. at p. 1021, the Lord Chancellor (Chelmsford) says: "The rule as to the effect of a bequest of personal estate by words, which would create an estate tail in freeholds, is well stated in Roper on Legacies, ch. 22, to this effect. If personal estate be given by testament to A. and the heirs of his body, as such words would create an express estate tail in freehold lands, if applied to them, so in personal estate, if applied to it, such words will have the effect to vest the absolute interest, because such property cannot be entailed, *id est*, the first taker will have the absolute interest in the bequest, and the remainder or the executory limitation to the heirs of his body, and the subsequent limitation, if any, depending on a failure of them, will be of no effect." In the above case, where the bequest was of leaseholds in trust to permit A. to receive the rents for life, with remainder to his heirs male, and the heirs male of their bodies, and in default of issue over, the rule was applied, and A. held entitled absolutely.

But the words used in this bequest, it is contended, mean something more specific than the words "heirs of

Judgment. his body," the testator having specified an intention
Robertson, J. which conveys the idea that he meant and intended that the bequest was to his widow and the "children of her body begotten by him." The words are, "to have and to hold unto her and the heirs of her body through her marriage with me—their and each of their sole and only use forever." The words "heirs of her body," are qualified, and that qualification shows, it is contended, that the testator meant his children or the child, with which his wife at the date of the will, and in fact at the time of his death was *enceinte*; and *Crawford v. Trotter*, 4 Madd. 361, and *Jesson v. Wright*, 2 Bli. 1, are relied on.

The words of the bequest in the first of these cases were: "To Lady Scott, and to her heirs (say children) I give and bequeath the like sum of £1000, three per cent. reduced annuities." Vice-Chancellor Sir John Leach was of opinion that Lady Scott was entitled for life, with remainder to her children; the word "heirs," which was used as synonymous with "children," importing that they were to hold after her death. But in the will now under consideration there is nothing in the context, which shows that the testator meant that the words "heirs of her body, through her marriage with me," should import any thing different from their ordinary natural meaning. If these words had been applicable to a devise of real estate, there is no doubt that they would make an estate tail special, and the widow would be entitled to such an estate; but as it is personalty, I am of opinion, that she is entitled absolutely to the residue of the estate under the will in question. "If words of art are used, they are to be construed according to the technical sense, unless upon the whole will, it is plain that the testator did not so intend:" per Sir Richard Arden, M.R., in *Thellusson v. Woodford*, 4 Ves. Jr., at p. 329. I cannot say that this testator did not understand the meaning of the words used by him, nor can I put a construction upon them different from what has long been received, or what is affixed to them by law: per Buller, J., in *Hodgson v. Ambrose*, 1 Doug. at

p. 341; *Milnes v. Slater*, 8 Ves. 206; per Parke, B., in *Judgment. Doe d. Winter v. Parratt*, 6 Man. & Gr. at p. 342; and per *Robertson, J.* Lord Kingsdown in *Towns v. Wentworth*, 11 Moo. P. C. at p. 543. The words "through her marriage with me," are these which gives the "special" character of the estate tail created by the preceding words "heirs of her body."

Then as to the case of *Jesson v. Wright*, 2 Bli. 1, it is against, instead of in favour of the contention above referred to. The devise was: "To W. (a natural son of testator's sister) for life, and after his decease to the heirs of his body, in such shares and portions as W., by deed, &c., shall appoint, &c. Held, an estate tail vested in W. The case is a most instructive one, and the Lord Chancellor in his judgment says, at p. 53: The words, "heirs of his body" will indeed yield to a clear particular intent, that the estate should be only for life, and that may be from the effect of superadded words, or any expression showing the particular intent of the testator, but that must be clearly intelligible and unequivocal." * * "Children, (p. 54,) are included undoubtedly in heirs of the body; and if there had been but one child, he would have been heir of the body, and his issue would have been heirs of the body; but, because children are included in the words 'heirs of the body,' it does not follow that heirs of the body must mean only children, where you can find upon the will a more general intent comprehending more objects." * * (at p. 55). "Upon the whole, I think it is clear that the testator intended that all the issue of William should fail before the estate should go over according to the final limitation." Then Lord Redesdale, in giving judgment in the same case, says, at p. 57: "I see no grounds to restrict the words 'heirs of the body,' to mean 'children' in this will." I am free to confess that it is quite possible that the testator in this case now before me, did not intend that in case his wife should have a child by him, that she, his widow, should take absolutely to the exclusion of such child, but all I can say as to that is, that it is a pity he did not consider the effect of the technical words used by him,

Judgment. and the rule of law operating upon them; if he had,
Robertson, J. most probably he would have used none of such words,
but would have employed language which would convey
quite a different meaning than that to which I feel myself
bound to apply them. In my judgment the defendant,
Ellen Cedar Magill, now Ellen Cedar Anderson, is entitled
absolutely to the residue of the personal estate, now in
the hands of the executors the plaintiffs, and I declare
accordingly.

The costs of all parties, as between solicitor and client,
will be paid out of the estate.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

TAYLOR V. MASSEY.

Defamation—Libel—Resolution passed at meeting—Letter published in newspapers—Accusation of conspiracy—Innuendo—Plaintiff not named—Surrounding circumstances—Excessive damages—Evidence of occurrences at meeting—Admissibility—Privilege.

The plaintiff, who was employed by a manufacturing company of which the defendant was president, brought an action for the seduction of his daughter against the superintendent of the company. Particulars in regard to the alleged seduction having appeared in public newspapers, a meeting of some of the members and servants of the company was held, at which the defendant presided, and a resolution was passed expressing confidence in the innocence of the superintendent of the alleged seduction. A letter was then or immediately afterwards drawn up and signed by a number of the persons present, including the defendant, handed to a reporter for publication, and was published in several newspapers, without any objection on the defendant's part.

The letter was addressed to the superintendent, referred to the charges against him which had appeared in the newspapers, declared the belief of the signers in his innocence, and concluded, "We believe you are the victim of a conspiracy as base and ungrateful as was ever sprung on an innocent man, and we pledge ourselves to stand by you until your innocence shall have been clearly established or until—which we are confident will never be—you are shewn to be the monster depicted in the public press." The plaintiff was not named in the letter.

The plaintiff sued the defendant for libel in consequence of the publication of this letter. The innuendo was that the plaintiff was guilty of the offence of conspiring and agreeing with his daughter to defame and slander or otherwise injure the reputation and character of the superintendent. The whole question of libel or no libel was left to the jury, who found for the plaintiff with \$1,500 damages:—

Held, that it was not necessary to decide whether the letter could be construed as supporting the innuendo of a criminal conspiracy; the question really was whether the defendant had libelled the plaintiff; and this question had been determined by the jury.

2. That the surrounding circumstances were admissible in evidence for the purpose of shewing that persons conversant with those circumstances might naturally conclude that the plaintiff was the person aimed at by the letter; and it was enough that the circumstances and the libel taken together pointed to some one, and that the jury found the plaintiff to have been the person intended.
3. That the verdict of the jury could not be interfered with on the ground that the damages were excessive.
4. That evidence of what took place at the meeting was admissible as proof that the plaintiff was the person intended by the resolution passed at it, the defendant having been present; and that a witness who was present at the meeting and took notes, which were afterwards printed, could refer to the printed copy, after the destruction of the original notes, to shew exactly what did take place.
5. That the occasion was not one of privilege or qualified privilege.

THIS was an action for an alleged libel, and was tried *Statement.* before ARMOUR, C. J., and a jury, at the Toronto Autumn Assizes on 9th September, 1890.

Statement.

The circumstances, so far as they are material to the present motion, were as follows :

On 13th August, 1889, an action was brought by the plaintiff against one Johnston to recover damages for the alleged seduction by him of the plaintiff's daughter. Both the plaintiff and Johnston were employees of the Massey Manufacturing Company, of which company the defendant was the president. Evidence was given that immediately after the bringing of the action some of the Toronto evening newspapers published reports of interviews between their reporters and the plaintiff's daughter, in which her statement as to her alleged seduction by Johnston was set forth under headings in conspicuous type, and that on the following day a meeting of employees of the Massey Manufacturing Company was held at which a resolution was passed expressing the belief of the persons present in the innocence of Johnston of the charge brought against him, and a letter was then, or immediately afterwards, drawn up and signed by a number of them and handed to a reporter for publication, and it was accordingly published in several newspapers. The reporter swore that the defendant was on the platform at the meeting and afterwards handed to him the letter for publication. To this letter the signature of the defendant, as president of the company, with the signatures of many of the employees, appeared to be attached, and it was published as having been signed by him without any objection on his part.

The letter was in the following words :

"Toronto, August 20th, 1889.

"W. F. Johnston, Esq., Superintendent of the Massey Manufacturing Company.

We, the members of the firm of the Massey Manufacturing Company and the employees of the office and works, desire to unite in expressing to you our entire confidence in your innocence of the offence charged against you as reported in the public press of yesterday. We cannot believe that you, whose record has been known to many of

us for years as that of an honourable Christian man, a kind husband, a loving father, and a faithful friend, have been guilty of so gross a departure from the path in which you have consistently walked. We are grieved that such a terrible odium should be cast upon you as such a charge must entail upon the purest soul that ever lived, and we can only hope that proof of your innocence may be made so plain that even defamation shall hang its head in shame. *We believe you are the victim of a conspiracy as base and ungrateful as was ever sprung on an innocent man*, and we pledge ourselves to stand by you until your innocence shall have been clearly established, or until, which we are confident will never be, you are shewn to be the monster depicted in the public press of this city. Statement.

For the Company, H. A. MASSEY, *President*.

C. D. MASSEY, *Vice-President*.

W. E. MASSEY, *Sec.-Treasurer*."

(And many others.)

The innuendo in the statement of claim was that the defendant meant "that the plaintiff was guilty of the offence of conspiring and agreeing with his daughter to defame and slander or otherwise injure the reputation and character of the said William F. Johnston, by formulating and publishing a false, wicked, and malicious charge against him of having seduced the plaintiff's said daughter, with the intent by means of such charge to extort money from the said William F. Johnston."

The jury found for the plaintiff, and assessed the damages at \$1,500.

At the Michaelmas Sittings, 1890, of the Divisional Court a motion was made on the part of the defendant to have the verdict set aside and for a new trial, or to have judgment entered for the defendant upon the grounds:

1. That the letter in question was not a libel.
2. That at all events it was not a libel on the plaintiff, or with the meaning alleged in the statement of claim.
3. That evidence was improperly admitted as to what took place at the meeting, and of the statements made

Statement. in the newspapers in their reports of the meeting, and the plaintiff was prejudiced by this, and by the comments of counsel upon it, and by misdirection to the jury.

4. That the letter was privileged.

5. That the damages were excessive.

The motion was argued on the 2nd and 3rd December, 1890, before the Divisional Court (FALCONBRIDGE and STREET, JJ.)

Osler, Q. C., for the defendant. We object to the admission of evidence of proceedings at the meeting. This is a case of limited privilege; what was done was in the conduct of the business of the defendant. He had a duty and right, without malice, to protect his company. There is no evidence of malice. I refer to *Todd v. Dun*, 15 A. R. 85. If there is privilege, then excess of language is no matter, there being no evidence of malice. The document itself, taken as a whole, is not a libel: *Todd v. Dun*, 15 A. R. 85. There is nothing to identify Taylor as the man pointed at. It might have been a conspiracy between his daughter and the newspapers—unless the Court is to assume he is the man because he is the plaintiff in the seduction suit. “Ingratitude” can only refer to the girl, who might conspire with the real father of the child. The damages awarded are grossly excessive. This publication is a mere incident in a long course of scandal and trouble. On the meaning of the words, I refer to *Stockley v. Clement*, 4 Bing. 162; *Fisher v. Clement*, 10 B. & C. 472; *Capital and Counties Bank v. Henty*, 7 App. Cas. 741; *Todd v. Dun*, 15 A. R. 85; *Rex v. Lambert*, 2 Camp. 398; *Mulligan v. Cole*, L. R. 10 Q. B. 549. On the question of privilege, *Todd v. Dun*, 15 A. R. at p. 97; *Washburn v. Cook*, 3 Denio 110; *Clark v. Molyneux*, 3 Q. B. D. 237; *McIntee v. McCulloch*, 2 E. & A. 390. If there was a question as to honest belief of the defendant, it should have been left to the jury: *Odgers*, 2nd ed., p. 163. As to the objections to the evidence received, I refer to *Parks v. Pincott*, 4 Ex.

169; *Regina v. Cooper*, 8 Q. B. 533; *Tench v. Great Western* **Argument**. *R. W. Co.*, 32 U. C. R. 452; *Koenig v. Ritchie*, 3 F. & F. 413. On the question of damages, I refer to *Mussie v. Toronto Printing Co.*, 11 O. R. 362; *Cook v. Cook*, 36 U. C. R. 553; *Ontario, etc., Co. v. Hewitt*, 30 C. P. 172; *Tuckett v. Eaton*, 6 O. R. 486.

Ryckman, on the same side, referred on the question of privilege to *Toogood v. Spyring*, 1 C. M. & R. 181; *Holliday v. Ontario, etc., Co.*, 1 A. R. 483; *Hamilton v. Eno*, 81 N. Y. 116; *Chaffin v. Lynch*, 1 S. E. Rep. 803; *Bigney v. Van Benthuyssen*, 36 La. 38. As to the charge of conspiracy, the plaintiff rested his case on a charge of crime at common law. See Newell on Defamation, pp. 67, 68, 249.

James A. Macdonald, for the plaintiff. The intention makes no difference. The question is, how did those to whom the words were originally published understand them? This is a question for the jury: *Odgers*, 2nd ed., pp. 93-94. This case is different from *Todd v. Dun*; the resolution and the letter, the entire defamatory matter, were placed before the jury. Conspiracy is a crime by R. S. C. ch. 173, sec. 26, and also at common law: *Russell on Crimes*, vol. 3, p. 109; *Wright on Conspiracy*, p. 110; *Regina v. Warburton*, L. R., 1 C. C. R. 276; *Regina v. Aspinall*, 2 Q. B. D. 48; *Regina v. Best*, 1 Salk. 174; *Rex v. Rispass*, 3 Burr. 1319; *Rex v. Gill*, 2 B. & Ald. 204; *Rex v. Armstrong*, Ventr. 304; *Rex v. Kimberty*, Levinz. p. 62, pt. I.; *State v. Norton*, 3 Zabriskie (N. J.), at p. 43; *Smith v. People*, 25 Ill. 17; *State v. Midland*, 5 Watts & Serg. (Pa.) 461; *State v. Buchanan*, 5 Harris & Johns. (Md.) 317; *Twitchell v. Commonwealth*, 9 Pa. St. 211; *Wright on Conspiracy*, p. 121. As to the Judge's alleged duty to withdraw the case from the jury, see *Odgers*, pp. 94, 95, 571. Whether or not the reference in the libel was to the plaintiff is a question for the jury: *Odgers*, p. 557. Upon the question of the meaning of the words and the office of the innuendo, I refer to *Odgers*, pp. 100, 112. As to the respective functions of Judge and jury,

Argument. see *Blagg v. Sturt*, 10 Q. B. 899; *Watkin v. Hall*, L. R. 3 Q. B. 402. As to what words are actionable, see Newell on Defamation, p. 112; and as to mere belief, Newell, p. 107; *Giddens v. Mirk*, 4 Ga. 364. As to the alleged improper admission of evidence of what took place at the meeting, I refer to Odgers, p. 309. A new trial will not be granted unless there has been a substantial miscarriage: Odgers, p. 581; Con. Rule 791; *Phillips v. Martin*, 15 App. Cas. 193. If the occasion were privileged, extensive publication would deprive it of that character: Odgers, p. 229. The charge against Johnston was not connected with the business of the defendant. The letter signed by the defendant was voluntary on his part; he was a mere third party who had not been attacked. One part of the letter may be privileged and another not privileged: *Warren v. Warren*, 1 C. M. & R. 250; *Jacob v. Lawrence*, 4 L. R. Ir. 579. As to damages, I refer to Odgers, pp. 293, 295, 579, 583, 309; *Praed v. Graham*, 24 Q. B. D. 53; *Flagg v. Roberts*, 67 Ill. 485; *Davis v. Shepstone*, 11 App. Cas. 187.

Osler, in reply, referred to Odgers, pp. 118, 121; *Coleman v. Goodwin*, 2 B. & C. 285, n.

February 2, 1891. STREET, J.:—

The innuendo in the statement of claim is intended to shew that the alleged libel charges the plaintiff with a criminal conspiracy, and many authorities were cited to us upon this point. It appears, however, unnecessary that we should decide whether the letter is capable of the construction placed upon it by the statement of claim, because without any objection the whole question of libel or no libel was left broadly to the jury. The letter appears undoubtedly to be one which, taken as a whole, may be properly treated as libellous under the ordinary and well-known definition of a libel. When the authors of it said to Johnston, as they did in this letter, "We believe you are the victim of a conspiracy as base and ungrateful as was ever

sprung on an innocent man," they meant that the conspirator was guilty of conduct calculated to bring him into hatred and contempt: and they did not take the sting of libel out of the words thus used by adding that they would stand by Johnston until it should be proved that he was either innocent or guilty.

Judgment.
Street, J.

The question to be tried between the parties really was whether the defendant had libelled the plaintiff, not whether he had charged him with a criminal offence; that is the question that the jury were asked to pass upon, and any amendments necessary to raise it can be made now, if necessary.

The plaintiff is not named in the letter, and it is argued that it was not a libel upon him. It is only necessary, however, that a crime or a disgraceful act should be charged to have been committed, and that some one should be indicated as having committed it, to enable the plaintiff to apply it to himself by innuendo. If there be contained in the alleged libel matter which is capable of the meaning put upon it by the innuendo, it then becomes simply a matter of proof of the innuendo: *Le Fanu v. Malcolmson*, 1 H. L. C. 637; *Capital and Counties Bank v. Henty*, 7 App. Cas. 741.

Here it was shewn that the plaintiff had brought an action against Johnston charging him with having seduced his daughter; that the object of the meeting at which the substance of the letter, if not the letter itself, was drawn up, was to declare the belief of those present that Johnston was innocent of the charge; the question then arises whether, under these circumstances, a statement of their belief that Johnston was in respect to the charge the victim of a conspiracy, pointed to the plaintiff as the conspirator or one of the conspirators. The circumstances surrounding what might otherwise be treated as a general statement pointing at no one in particular, may be sufficient to convert it into a charge against an individual of the clearest and most positive kind. For instance, if the body of an unknown person were found and a newspaper should say,

Judgment. "We believe the man was murdered," meaning only that
Street, J. he had not died a natural death, it would be impossible to convert by any innuendo this statement into a libel upon any particular person; but if a man is killed by X., who publicly admits having killed him, but asserts that the killing was justifiable, it would be libellous to say, "We believe the man was murdered," because that would be equivalent to saying "X murdered him."

So in the present case the circumstances surrounding it are admissible for the purpose of shewing that when the defendant and his employees used the words, "We believe you are the victim of a conspiracy," the persons conversant with those circumstances would, or at all events might, naturally conclude that the plaintiff was the person aimed at. For it is not necessary that the libel, when taken in connection with the circumstances, be shewn to point to the plaintiff, and to no one else; it is enough if the circumstances, and the libel taken together point to some one, and that the jury find the plaintiff to have been the person intended; this they have found here, and their finding, being, in my opinion, based upon evidence which could not be withdrawn from them, cannot be disturbed.

The question of the right and duty of the Court to interfere with the finding of a jury upon the question of damages was lately considered at length in this Division in *Moody v. The Canadian Bank of Commerce*,* where a

* The case of *Moody v. The Canadian Bank of Commerce* is not reported. The judgment of the Divisional Court (ARMOUR, C.J., and FALCONBRIDGE, J.), was delivered on the 31st December, 1890. The action was for malicious prosecution, and the damages were assessed at \$8,500. ARMOUR, C.J., in delivering the judgment of the Court said: "The question remains whether the damages can be held to be so excessive as to call for the interference of the Court. The law has confided to juries and not to Judges the power of awarding damages in actions of malicious prosecution, and unless we can see that they have been subject to some improper influence or have been actuated by some improper motive in awarding them, we ought not to interfere with their award. It is impossible for us to say that any improper appeal was made to the jury by the plaintiff's counsel or any appeal that ought to induce us on that account to interfere with their award of damages, and it is equally impossible for us to say

number of cases bearing upon the question, were referred to. I may refer, in addition to those, to *Turner v. Merryweather*, 7 C. B. 251, an action for a libel stating that the defendant had by undue influence procured the execution of a power of attorney for the transfer of a sum of money. The jury gave £1,000 damages to the plaintiff, and Wilde, C. J., says, with reference to the objection that the damages were excessive: "Looking at the nature of the imputations cast upon the plaintiff by the publication in question, and having no certain test for ascertaining the precise measure of damages in such a case, I cannot say that the sum awarded is excessive."

Judgment.
Street, J.

The evidence alleged to have been improperly admitted consists, first, of what took place at the meeting, and, second, of the account given in the newspapers of what took place at it.

I think the evidence of what took place at the meeting was admissible as proof that the plaintiff was the person intended by the resolution passed at it, the defendant having been present. The account published in the newspaper was referred to by the witness as being an accurate report, written by himself at the time while the event was fresh in his recollection, of what took place at the meeting; and, if the occurrences at the meeting were, as I think they were, admissible in evidence for the purpose of shewing the meaning of the resolution passed at it, the defendant

that the jury were actuated by any improper motive in awarding the damages they did. The damages awarded were such as, in our opinion, twelve reasonable men might have given, and are no larger than those awarded in many, and not so large as those awarded in some, cases which the Court have declined to interfere with: *Hewlett v. Cruchley*, 5 Taunt. 277; *Fabrigas v. Mostyn*, 2 W. Bl. 929; *Leith v. Pope*, *ib.* 1327; *Robertson v. Meyers*, 7 U. C. R. 423; *Praed v. Graham*, 24 Q. B. D. 53. The conduct of the defendants was extremely reprehensible. The prosecution was not commenced or carried on against the plaintiff for the purpose of vindicating the law and punishing the plaintiff as an offender against it, but for the sole and only purpose of compelling the plaintiff to execute a deed which the defendants wanted him to execute. Under these circumstances it is a matter of no surprise that the damages awarded by the jury were large, and we see no reason in law to interfere with them."

Judgment. having been present throughout, there seems no reason
Street, J. why the witness, who took notes at it and printed them, should not refer to the printed copy, after the destruction of the original notes, for the purpose of shewing exactly what those occurrences were.

It was contended that the occasion was one of qualified privilege, and that the question of malice should have been left to the jury. The grounds upon which this contention was raised were these: that Johnston was the foreman of the works of the company of which the defendant was president; that the newspapers had published an account of an interview between the plaintiff's daughter and a reporter in which statements were made by the former injurious to the character of Johnston; that the effect of these statements, if they were permitted to remain uncontradicted, would be detrimental to the business of the company, because of Johnston's connection with it; and that, therefore, the meeting and resolution were necessary to protect the private interests of the defendant and of the company of which he was president.

I find a good deal of difficulty in deducing the conclusions from the premises in this argument, with sufficient confidence to enable me to differ from the learned Chief Justice, who ruled that the occasion was not a privileged one.

The meeting seems to have had for its object rather that of assuring Johnston of the sympathy and friendship of his employers and of those under him, than of meeting any anticipated injury to the business; but even if it were possible to treat the meeting as called to protect the business by declaring the charges against Johnston incredible, even that object might have been attained without the use of language capable of being construed as a libel upon the plaintiff.

In my opinion, the motion should be dismissed with costs.

FALCONBRIDGE, J. :—

Judgment.

Falconbridge,
J.

As to the claim of privilege. The defendant was president of a company, whereof Johnston was the foreman, and the business of the company was the manufacturing and selling of agricultural implements.

The defendant's pretension was that the making of this charge, or the bringing of the action against Johnston, would or might have a prejudicial effect on the interests of the company, or, to reduce the proposition to plain language, that the effect would be that farmers or other persons desiring to buy a machine of the kind manufactured by the company would prefer not to buy the best machine they could get at the lowest price, wherever they could get it, but would pass by the Massey Company and purchase elsewhere, because a servant of the company had been merely charged with an immoral act.

I can understand the faculty of a college or the managers of a church honestly thinking that their usefulness (and possibly the pecuniary result of their labours) might be impaired by the mere suggestion that one of their officers or servants was or had been guilty of acts of sexual immorality, but for a manufacturing concern to make such a claim appears to me to be the very climax of absurdity. There was no privilege qualified or unqualified.

There was abundant evidence upon which the jury could find that defendant published the libel, and the jury pointed the innuendo against the plaintiff, as they had a right to do on the law and the evidence.

The argument on this branch of the case was, for the most part, only applicable to an action for verbal defamation. It is not of the slightest consequence whether a crime (statutory or otherwise) was charged against the plaintiff. The written words were defamatory as exposing the plaintiff to hatred, contempt, ridicule, and obloquy. The plaintiff was the cause of this difficulty by laying his innuendo on the charge of a crime.

The motion will be discharged with costs.

[QUEEN'S BENCH DIVISION.]

ONTARIO INVESTMENT ASSOCIATION v. SIPPI.

Company—Calls—Allotted stock—R. S. O. ch. 157, sec. 45—Transfer of shares—Validity of.

A call upon shares under the Joint Stock Companies Act, R. S. O. ch. 157, means a call made by the directors in pursuance of the powers given to them by sec. 44 of that Act.

An otherwise valid transfer of shares allotted to the transferor upon which he has not paid anything, no calls having been made at the time of transfer, is not invalid because the ten per centum upon allotted stock directed by sec. 45 of the Act to be "called in and made payable within one year from the incorporation of the company" has not been paid. The last mentioned section is directory merely.

Statement.

THE plaintiffs alleged that the defendant was the holder of forty-nine shares of the capital stock of the plaintiffs' company, and that he was indebted to them in the sum of \$2,450 in respect of one call upon forty-nine shares of the capital stock, amounting to that sum, with interest thereon from the 10th day of November, 1887, and that by reason thereof an action had accrued to the plaintiffs under the Ontario Joint Stock Companies' Letters Patent Act. The defendant denied the allegations contained in the statement of claim, and put the plaintiffs to the proof thereof.

The cause was tried at the Winter Sittings, 1890, of this Court at London, by FALCONBRIDGE, J., without a jury.

It appeared that the defendant was an original shareholder of forty-nine shares in the plaintiffs' association, which was incorporated on the 6th April, 1880, under the provisions of R. S. O. ch. 157.

That on the 11th July, 1887, the defendant executed a transfer of the said shares to one John Wright in the transfer book of the plaintiffs' association.

That on the 5th of August, 1887, the directors of the plaintiffs' association met and passed the following resolu-

tion: "That the several alleged transfers shewn on the ^{Statement.} statement of transfers produced of accumulating shares, and marked with a cross, be not assented to by the company, but be disaffirmed, and that the manager be instructed to notify the transferror and the transferee of the action of the board."

The transfer above mentioned was one of the transfers referred to in the said resolution.

After passing the said resolution the directors made the call which was sued for in this action.

The learned Judge held the defendant not to have been a shareholder when the call was made, and dismissed the action with costs.

At the Michaelmas Sittings of the Divisional Court, 1890, the plaintiffs moved for an order setting aside the said judgment and entering judgment for the plaintiffs for the sum of \$2,450 and interest thereon from the 10th November, 1887, upon the ground that upon the law and evidence the defendant was liable for the payment of the call in respect of which this action was brought.

On the 27th November, 1890, the motion was argued before ARMOUR, C. J., and STREET, J.

W. R. Meredith, Q. C., for the plaintiffs. First, by sec. 45 of R. S. O. ch. 157, a statutory call of ten per cent. was payable within one year from the incorporation of the company; and by sec. 48 no shares were transferable until that call was paid. Second, the directors did not ratify the transfer made by the defendant to Wright. Third, in any view the defendant is liable for the ten per cent. call, and judgment should be given against him for that amount. I rely on secs. 41, 44, 45, 48, 49, 50, which must all be read in connection with sec. 61, the provision which makes shareholders liable to creditors. The directors are the agents of the shareholders; the omission of the directors is the omission of the share-

Argument. holders; the default of the directors to call in the ten per cent. is the default of the shareholders: *Portal v. Emmens*, 1 C. P. D. 201, 664; *Alexander Mitchell's Case*, 4 App. Cas. 567, 574. *Ex p. Littledale*, L. R. 9 Ch. 257, is cited in Thring on Joint Stock Companies, 4th ed., p. 47, for exactly the opposite of what it decides. In that case the disability was personal; here it affects the shares, not the person. Here the ten per cent. was payable by the statute and might have been sued for as a statutory debt. I rely on *Anderson's Case*, L. R. 8 Eq. 509; Thring, pp. 46, 47; *Mitchell v. Glasgow Bank*, 4 App. Cas. 624; *Tennent v. Glasgow Bank*, *ib.* 615.

Gibbons, Q. C., for the defendant. There was a *bond fide* transfer to Wright, who is now a director of the company. We have nothing to do in this action with the rights of creditors. The defendant had the right to transfer the shares unless there was something in the statute to prevent it. The directors could not refuse to assent to the transfer; it was made in the book provided by the company for the purpose. There is no such thing as a statutory call. How could the plaintiffs sue the defendant for a call without giving notice as the law provides? I refer to *Bargate v. Shortridge*, 5 H. L. C. 297; *In re Cawley*, 42 Ch. D. 209; Lindley's Law of Companies, p. 466.

Meredith, in reply.

December 31, 1890. The judgment of the Court was delivered by

ARMOUR, C. J.:—

By the Act under which the plaintiffs' association was incorporated, "The Ontario Joint Stock Companies' Letters Patent Act," R. S. O. ch. 157, it is provided, sec. 41, that "the stock of the company shall be deemed personal estate, and shall be transferable, in such manner only, and subject to all such conditions and restrictions as by this Act, or by the letters patent or by-laws of the company, may be prescribed."

It was not shewn that any conditions or restrictions were prescribed by the letters patent, and the only provision in the by-laws of the plaintiffs' association relating to the transfer of shares was that "any shareholder may transfer his share or shares by making a transfer in the books of the association in such manner as the directors may appoint, and thereupon the transferee shall be entitled to all the privileges and subject to all the liabilities (as far as the association is concerned) of the original shareholder." Judgment.
Armour, C.J.

A transfer book was provided by the plaintiffs' association for the purpose of the transfer therein of the shares of the plaintiffs' association, and in the absence of anything else having been done by the directors in relation to the transfer of shares, it must be taken that the providing of this book for that purpose was the appointing by the directors of the manner in which transfers of shares should be made.

So far, therefore, as the by-laws of the plaintiffs' association were concerned, the transfer in question was validly made, and we must look to the statute to see whether the conditions and restrictions prescribed by it prevented such transfer.

It is provided, sec. 48, that "no share shall be transferable, until all previous calls thereon have been fully paid in;" sec. 49, that "no shareholder being in arrear in respect of any call shall be entitled to vote at any meeting of the company;" and sec. 51, that "the directors may refuse to allow the entry, into any such (transfer) book, of any transfer of stock whereon any call has been made which has not been paid in."

Unless, therefore, a call had been made and was unpaid, it is clear that the transfer in question was validly made; but it was argued that although no call had in fact been made by the directors, there was nevertheless a statutory call by virtue of sec. 45; that "not less than ten per centum upon the allotted stock of the company shall, by means of one or more calls, be called in and made payable within one year from the incorporation of the company;"

Judgment. and that such statutory call was a call within the meaning of the Act, and, being in arrear, the transfer in question could not be made (sec. 48), and no shareholder being in arrear could vote (sec. 49), and the directors might refuse to allow entry of the transfer in the transfer book (sec. 51).

Armour, C.J.

But it is manifest from the Act that a call means a call made by the directors in pursuance of the powers given to them by the Act, sec. 44, that "the directors of the company may call in and demand from the shareholders thereof, respectively, all sums of money by them subscribed (including clearly the ten per centum mentioned in sec. 45) at such times and places and in such payments or instalments, as the letters patent, or this Act, or the by-laws of the company require or allow; and interest shall accrue and fall due, at the legal rate for the time being, upon the amount of any unpaid call, from the day appointed for payment of such call."

It was, no doubt, the duty of the directors to call in ten per centum upon the allotted stock of the company within one year from the incorporation; but the ten per centum was not payable unless and until such call was made; and this neglect of duty could not make that a call which was not a call, and render the shareholder liable to pay this ten per centum without a call, which was only made payable by virtue of a call, and deprive him of his rights as a shareholder and work a forfeiture of his shares for being in arrear in respect of a call which was never in fact made. We think that sec. 45 is directory only, and that the neglect of the directors to make the call thereunder had not the effect of making the defendant in arrear for the ten per centum in respect of his shares, so as to prevent his making a transfer of them.

We think that the transfer in question was validly made, as and when it was made, and that thereupon the defendant ceased to be a shareholder in the plaintiffs' association, and that the judgment of the learned Judge was right; and we dismiss the motion with costs.

[QUEEN'S BENCH DIVISION.]

KENT ET AL. V. KENT.

Husband and wife—Conveyance of land to wife directly—Equitable estate in wife—Husband trustee of legal estate—Devise of land by wife to infant children—Possession by husband—Natural guardian—Statute of Limitations.

A husband, who was married in 1854, made a conveyance of lands direct to his wife in 1870, which was expressed to be in consideration of "respect and of one dollar," was in the usual statutory short form, and was duly registered:—

Held, affirming the decision of *BOYD, C.*, *ante* p. 158, that the conveyance had the effect of conveying the equitable estate in the lands to the wife, leaving the legal estate in the husband as trustee thereof for the wife.

A gift from a husband to a wife is not an incomplete gift by reason of the incapacity of the wife at law to take a gift from her husband.

Re Breton's Estate, 17 Ch. D. 416, commented upon.

The wife died in 1872, having made a will leaving her real estate to the two daughters of herself and husband, who were then aged respectively seventeen and twelve. The husband remained in possession during the wife's life, and from her death till his own death in 1890. This action was begun in 1890 by the younger daughter and the son of the elder to recover possession from the devisee of the husband:—

Held, reversing the decision of *BOYD, C.*, that the Real Property Limitation Act did not apply so as to extinguish the rights of the plaintiffs to recover; the presumption being that the husband, after conveying to his wife, was in possession of the lands and in receipt of the rents and profits, for and on behalf of his wife; and that, upon his wife's death, he entered into possession and receipt for and on behalf of his infant children and as their natural guardian; and, this being so, his possession and receipt were the possession and receipt of his wife, and after her death, of his children and those claiming under them; and the statute, therefore, never began to run.

Wall v. Stanwick, 34 Ch. D. 763; *In re Hobbs*, 36 Ch. D. 553; *Lyell v. Kennedy*, 14 App. Cas. 437, followed.

Hickey v. Stover, 11 O. R. 106; *Clark v. McDonnell*, a decision of the Common Pleas Divisional Court, reported *post*, not followed.

AN appeal by the plaintiffs from that portion of the judgment of *BOYD, C.*, 20 O. R. 158, which related to the lands conveyed by Charles W. Kent to his first wife, Catharine Kent. The lands in question were referred to as lots 7 and 8 on Kent street, in the city of London.

The plaintiffs were the daughter and grandson of Catharine Kent, claiming the lands under the conveyance to her directly from her husband, Charles W. Kent, and her will; and the defendant was the second wife and widow of Charles W. Kent, claiming under his will, and

Statement. setting up that he was the owner in fee of lots 7 and 8 at the time of his death, by reason of the invalidity of the conveyance from him to Catharine Kent, and by length of possession.

The facts are more fully stated in the report of the case in 20 O. R. 158.

The appeal was argued before the Divisional Court (ARMOUR, C. J., and STREET, J.) on the 27th November, 1890.

Gibbons, Q. C., for the plaintiffs. The contest is only as to the Kent street property, which was conveyed by Charles W. Kent directly to his wife in 1870. Catharine Kent died in 1872, and Charles W. Kent remained in possession until his death, in 1890. If he was a trespasser at all he must have been a trespasser from the beginning. C. S. U. C. ch. 73 applies to this case, the marriage having been in 1854. Neither of the children was of age when the wife died; one was twelve, and the other seventeen. Charles W. Kent remained in possession as tenant by the curtesy, as trustee, or as bailiff. I refer to R. S. O. ch. 111, sec. 12; R. S. O. ch. 108, sec. 30; Shelford's R. P. Statutes, 8th ed., p. 205; *Drummond v. Sant*, L. R. 6 Q. B. 763; *Furness v. Mitchell*, 3 A. R. 510; *Thomas v. Thomas*, 2 K. & J. 79; *Wall v. Stanwick*, 34 Ch. D. 763; *In re Hobbs*, 36 Ch. D. 553; *Re Taylor*, 8 P. R. 207.

W. R. Meredith, Q. C., for the defendant. The deed by Charles W. Kent to his wife had no operation. Husband and wife are still one person: *Re March*, 24 Ch. D. 222; 27 Ch. D. 166; *Re Jupp*, 39 Ch. D. 148; *Ogden v. McArthur*, 36 U. C. R. 246; *Meek v. Kettle*, 1 Phillips 342. Unless there is a valuable consideration no equity arises in favour of the wife, either upon principle or authority: *Richards v. Delbridge*, L. R. 18 Eq. 11. I refer also to *Milroy v. Lord*, 4 DeG. F. & J. 264; *Kekewich v. Manning*, 1 DeG. M. & G. 176; *Re Breton's Estate*, 17 Ch. D. 416; *Baddeley v. Baddeley*, 9 Ch. D. 113; *Grant v. Grant*, 34 Beav. 623; *Glass v. Burt*, 8 O. R. 391; *Whitehead v. Whitehead*, 14 O. R.

621 ; *Cochrane v. Moore*, 6 Times L. R. 296 ; Eversley on Argument. Dom. Rel. p. 192 ; *Mutlow v. Bigg*, L. R. 18 Eq. 246. I also contend, if it should be held that the deed is operative, that the Statute of Limitations had run in favour of Charles W. Kent at the time of his death, and rely upon the judgment of the Chancellor.

Gibbons, in reply. If the deed had any effect at all, how could the statute run against these plaintiffs claiming under that deed ? I refer to *Till v. Till*, 15 O. R. 133, to shew that husband and wife are no longer one person in law.

February 2, 1891. ARMOUR, C. J.:—

My own opinion is that since the Act 22 Vic. ch. 34 an effectual conveyance of the legal estate in land can be made by a husband to his wife, and that the ability of the wife to take such legal estate springs by necessary implication from the very words of the Act ; that such conveyance would have the same and no other or greater effect than a like conveyance from a stranger to the wife ; and that no conveyance or other act of the wife in respect of such legal estate would deprive her husband of his tenancy therein by the curtesy. If this opinion were to prevail it would entitle the plaintiffs to succeed as to the lands in question, for the Statute of Limitations would not begin to run against them until the husband's death. But it is quite clear from the construction placed upon this Act by judicial decision, that this opinion cannot prevail, and I only mention it in order that it may not be assumed that I hold a different opinion.

The conveyance, however, from the husband to the wife in this case had the effect of conveying the equitable estate in the lands in question to the wife, leaving the legal estate therein in the husband, and he thereby became a trustee of such legal estate for the wife.

This was the opinion in a like case of Strong, V.-C., in *Davisson v. Sage*, 20 Gr. 115, and is supported and established by authority.

Judgment. In *Harvey v. Harvey*, 1 P. Wms. 125, (1710), A., having a daughter married to the defendant, by his will devised his personal estate to his daughter, to hold to her particular and separate use, and died. Afterwards the defendant, the husband, (part of this personal estate consisting of a mortgage) agreed by writing under his hand that the wife should enjoy it to her separate use. The Lord Chancellor doubted whether the wife could have this devise to her separate use without the consent of her husband, and said, "But as to the mortgage, where the husband has contracted or declared under his hand that he would not intermeddle with it; though such declaration may be voluntary, yet it must be presumed to proceed from a sense the husband had of the testator's intent that the wife should enjoy this mortgage separately; and to be founded on natural justice, though not on contract. For which reason, the Court was clearly of opinion that the husband should be bound by this agreement."

The doubt which the Lord Chancellor expressed was afterwards fully removed. The following note is appended to *More v. Freeman*, Bunbury 205. "*Mitchell Vid' v. Mitchell*, 15th and 18th of July, 1712, in Scacc', where there was a gift by the husband to the wife without the intervention of trustees, it was held good in equity."

In *Lucas v. Lucas*, 1 Atk. 270, (1738), the testator transferred to his wife £1,000 South Sea annuities, and the Lord Chancellor held this transfer to be good as against the testator and to be answered out of his personal estate if sufficient, and said: "In this Court gifts between husband and wife have often been supported, though the law does not allow the property to pass; it was so determined in the case of Mrs. Hungerford and in Lady Cowper's case, before Sir Joseph Jekyll, where gifts from Lord Cowper in his lifetime were supported, and reckoned by this Court, as part of the personal estate of Lady Cowper."

In *McLean v. Longlands*, 5 Ves. 71, (1799), a claim was made by the testator's widow to dividends to which he was entitled under a bankruptcy as a gift by him to her

separate use. The Master of the Rolls (Sir Richard ^{Judgment.} Pepper Arden, post Lord Alvanley) said : " The only point ^{Armour, C.J.} upon which I entertain any doubt is as to the gift : but I do not think there is sufficient ground to direct an issue. Nothing less would do than a clear irrevocable gift either to some person as a trustee, or by some clear and distinct act of his by which he divested himself of his property, and engaged to hold it as a trustee for the separate use of his wife."

In *Walter v. Hodge*, 2 Swans. 92, (1818), the claim was of the gift of bank notes from the husband to the wife. The Master of the Rolls : " Here is no sufficient evidence of the gift. I will shortly notice the authorities, in order that it may be clearly understood that in negating this claim, I do not negative the proposition that, in equity, a gift by a husband to his wife may, under circumstances, be valid, but proceed solely on the insufficiency of the evidence." Then, after referring to the authorities, he said : " In the single case of £1,000 South Sea Annuities, transferred by the husband into the name of his wife in his lifetime, the Court thought that so decisive an act, as amounted to an agreement by the husband that the property should become hers. That seems to come under the description stated by Lord Alvanley ; it is an act ; a clear and distinct act, by which the husband divested himself of his property. The single question, therefore, in applying this doctrine to a particular subject would be whether the claimant had satisfactorily established a clear distinct act of the husband, by which he divested himself of the property, and agreed to hold it as trustee for his wife ? "

In *Price v. Price*, 14 Beav. 598, (1851), the husband made a deed poll to his wife in consideration of good will by which he gave and granted to his wife all his land, house, and chattels, and thereby declared that he had absolutely and of his own accord given and granted the same without any manner of condition to his said wife, and that it was her sole and absolute property thenceforth and forever. The Master of the Rolls held that this deed would have

Judgment. been inoperative as a gift if made to a stranger, and was
Armour, C.J. equally inoperative being made to the wife, and that the Court would not convert an imperfect gift into a trust.

In *Mews v. Mews*, 15 Beav. 529, (1852), the Master of the Rolls said: "I entertain no doubt that there may be a gift made by a husband to his wife which, though bad at law, would be supported in equity. * * Though the property does not pass at law, yet, in equity, a husband, being the owner at law, may become a trustee for his wife; and if by clear and irrevocable acts he has made himself such trustee, the gift to his wife will be conclusive. The only question in the present case is whether there is distinct evidence of such a gift. * * The evidence which is required to constitute a valid gift, as I have before stated, is that there must be some clear and distinct act by which the husband has divested himself of the property, and engaged to hold it as a trustee for the separate use of his wife. * * If he had himself deposited the money with bankers, or with those gentlemen as quasi bankers, stating that they were to hold it for his wife, that would probably have been sufficient for that purpose."

In *Hoyes v. Kindersley*, 2 Sm. & G. 195, (1854), the Vice-Chancellor said: "There is no doubt that this Court will support a gift by a husband to a wife during coverture for her separate use; but, as stated by Lord Alvanley, and repeated by Sir Thomas Plumer in the case of *Walter v. Hodge*, there must be an unequivocal act by which the husband divests himself of the property and places it at the disposal of the wife. The transfer of stock into the name of the wife is *prima facie* evidence of a gift to the wife, but it may be rebutted by evidence tending to shew that no gift was intended. In *Lucas v. Lucas* the Court held that there was strong presumptive evidence of an intention to give the South Sea stock to the wife; and there being nothing to rebut it, the gift was supported by this Court."

In *Milroy v. Lord*, 4 DeG. F. & J. 264 (1862), T. M. executed a voluntary deed purporting to assign fifty

of his shares in the L. Bank to S. L., to be held by him upon certain trusts for the benefit of the plaintiffs. The shares were transferable only by entry in the books of the bank; but no such transfer was ever made. Turner, L. J., said: "I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

In *Grant v. Grant*, 34 Beav. 623, (1865), the claim was made by the widow to certain chattels which she alleged that her husband had given her. The Master of the Rolls said: "It has been very properly observed, on both sides, that, in cases of this description, the question in equity is merely one of evidence, and that it cannot now be disputed that a husband may be a trustee for his wife. That is perfectly settled, and the only question is whether he has constituted himself such a trustee or not. I apprehend that

Judgment. the fact of the transaction taking place between the husband and the wife, instead of between strangers, makes no difference, in this respect, further than this:—that, in the case of a gift of chattels by one stranger to another, there must be a delivery of the chattels in order to make the gift complete, whereas, in the case of husband and wife there cannot be a delivery, because, assuming they are given to the wife, they still remain in the legal possession of the husband, and therefore it is impossible to give that completion to the gift that would be necessary to give effect to it between strangers. Therefore, this comes under that class of cases in which it has been held that though there is not an absolute delivery a declaration of trust is sufficient. The question here is whether the husband has used words which are equivalent to a declaration of trust. In the first place, these words need not be in writing, that is quite settled by the authorities. They must be clear, unequivocal, and irrevocable, but it is not necessary to use any technical words, it is not necessary to say ‘I hold the property in trust for you,’ nor is it necessary to say ‘I hold the same for your separate use.’ Any words that shew that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust. I think it is also sufficient, for the purpose of shewing that the trust has been created, if he afterwards states that he has so created the trust, though there was no witness except the donee present at the time the trust was created.”

In *Jones v. Lock*, L. R. 1 Ch. 25, Cranworth, L. C., said : “No doubt a gift may be made by any person *sui juris* and *compos mentis*, by conveyance of a real estate or by delivery of a chattel; and there is no doubt also that, by some decisions, unfortunate I must think them, a parol declaration of trust of personalty may be perfectly valid even when voluntary. If I give any chattel that, of course, passes by delivery, and if I say, expressly or impliedly, that I constitute myself a trustee of personalty, that is a trust executed, and capable of being enforced without

consideration. I do not think it necessary to go into any ^{Judgment.} of the authorities cited before me; they all turn upon the ^{Armour, C. J.} question whether what has been said was a declaration of trust or an imperfect gift. In the latter case the parties would receive no aid from a Court of equity if they claimed as volunteers. But when there has been a declaration of trust, then it will be enforced, whether there has been consideration or not."

In *Richardson v. Richardson*, L. R. 3 Eq. 686, E., by a voluntary deed, in 1858, assigned certain specific property, and all other the personal estate, whatsoever and wheresoever, of her, the said E., to R. absolutely, with usual appointment of R. her attorney, &c. At the date of the assignment E. was possessed of certain promissory notes, given to her to secure the repayment of advances made by her. These were not specifically mentioned in the deed. Upon R.'s death, in 1864, these notes were found in his possession, but not indorsed to him. There was no evidence as to any delivery of the notes by E. to R. It was held by Sir W. Page Wood, V.-C., that the assignment amounted to a declaration by the assignor that she held the notes as a trustee for the assignee.

In *Morgan v. Malleon*, L. R. 10 Eq. 475, the following memorandum "I hereby give and make over to Dr. Morris an India bond, No. D., value £1000, as some token for all his very kind attention to me during illness."

"Witness my hand, this 1st day of August, 1868,"

"JOHN SAUNDERS,"

was held by Lord Romilly, M. R., to be equivalent to a declaration of trust in favour of Dr. Morris. The signature of Saunders was attested by two witnesses, and the memorandum was delivered to Morris, but the bond, which was transferable by delivery, remained in the possession of Saunders. There was no consideration for it. Lord Romilly, M. R., said: "I am of opinion that the paper-writing signed by Saunders is equivalent to a declaration of trust in favour of Dr. Morris. If he had said, 'I undertake to hold the bond for you,' or if he had said, 'I here-

Judgment. by give and make over the bond in the hands of A., that
Armour, C.J. would have been a declaration of trust, though there had been no delivery. This amounts to the same thing; and Dr. Morris is entitled to the bond, and to all interest accrued due thereon."

In *Warriner v. Rogers*, L. R. 16 Eq. 340, Bacon, V.-C. said: "Now, the rule of law upon this subject I take to be, very clear, and with the exception of two cases which have been referred to, the decisions are all perfectly consistent with that rule. The one thing necessary to give validity to a declaration of trust—the indispensable thing—I take to be, that the donor, or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect and put the property out of his power, at least in the way of interest. The two exceptions I have referred to are the cases of *Richardson v. Richardson* and *Morgan v. Malleson*." He then proceeded to discuss those cases.

In *Richards v. Delbridge*, L. R. 18 Eq. 11, the deceased was possessed of a mill, with the plant, machinery, and stock-in-trade, which was held under a lease dated the 24th June, 1863. On the 7th March, 1873, he indorsed upon the lease and signed the following memorandum: "7th March, 1873. This deed and all thereto belonging I give to Edward Bennetto Richards from this time forth, with all the stock-in-trade." Jessel, M. R., quoted with approval the rule laid down by Bacon, V.-C., in *Warriner v. Rogers*, and that laid down by Lord Justice Turner in *Milroy v. Lord*, considers them directly opposed to *Richardson v. Richardson* and *Morgan v. Malleson*, and said: "The true distinction appears to me to be plain, and beyond dispute: for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift shew an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise."

See also *Moore v. Moore*, L. R. 18 Eq. 474; *Heurtley v.*

Nicholson, L. R. 19 Eq. 233; *Rummens v. Hare*, 1 Ex. Judgment. D. 169.

Armour, C.J.

In *Baddeley v. Baddeley*, 9 Ch. D. 113, on the 30th April, 1872, John Baddeley executed a deed-poll, of which the material part was as follows: "Whereas I am beneficially possessed of the ground-rents hereby intended to be settled, now in consideration of my love and affection for my wife, I do hereby settle, assign, transfer, and set over unto my said wife as though she were a single woman, her executors, administrators, and assigns, all that my share in (certain specified houses and ground-rents in Middlesex) as though she were now a *feme sole* and unmarried, and in accordance with the spirit and intention of the recent Act of Parliament entitled the Married Women's Property Act, 1870." This deed was duly registered in the Middlesex Registry, and Mrs. Baddeley entered into the receipt of the rents. She claimed a declaration that the deed-poll operated as a valid assignment. Malins, V.-C., said: "No doubt a voluntary gift by way of assignment is invalid, unless it is perfected by a transfer; the voluntary settlor must do all that he can do to transfer the property, and a husband cannot transfer to his wife. But this is, in my opinion, a case where the husband has declared himself a trustee for his wife."

In *Fox v. Hawks*, 13 Ch. D. 822, in 1875 Henry Clinton Fox, being about to leave England for a prolonged residence in India, was asked by his wife to make a provision for her, she not being about to accompany him, and by an indenture dated the 23rd of February, 1875, and expressed to be made between Henry Clinton Fox of the one part, and the plaintiff, Emma Alice Fox, of the other part, a leasehold house, No. 39, Weighton Road, South Penge Park, Penge, Surrey, was assigned by H. C. Fox to Emma A. Fox, "to hold the same unto the said Emma A. Fox, her executors, administrators, and assigns, as her separate estate," for the residue of the term. Bacon, V.-C., said: "Mr. Fox, knowing that to give a certain shape of validity to the deed trustees were necessary,

Judgment. declined to name trustees. What is the consequence of that? The legal consequence is plain and beyond doubt, *Armour, C.J.* that he, knowing that trustees might conveniently be appointed, chose to constitute himself the sole trustee of this deed. Now, the case which was referred to of *Baddeley v. Baddeley*, in my opinion, if any authority was necessary—although I do not think that any authority is necessary—establishes that plainly. He became a trustee, and he relinquished all beneficial interest in the property, and, according to the doctrine now well established in this Court, a husband may, under such circumstances, become a trustee for his wife, but cannot retain any beneficial interest in the thing which is the subject of the deed.”

In *Re Breton's Estate*, 17 Ch. D. 416, the testator having previously purchased some furniture, on the 22nd April, 1868, wrote and handed to his wife the following paper: “This is to certify that there being now at Messrs. Maple & Co., 145, Tottenham Court Road, one hundred pounds worth of furniture belonging to me, I give the same to my dear wife Agnes H. Breton, absolutely and unreservedly, for her own use and benefit.” The testator having purchased some plate and plated articles, wrote to his wife on the 1st June, 1868, as follows: “I this day make you a present of the plate, &c., now at Mappin & Webb's, and which they are taking care of for me, for your sole use and benefit. The sum I paid for it is £59. 7s. 10d.” On the 18th June, 1868, the testator wrote and handed to his wife the following: “Having previously made over to you for your sole use and benefit a certain amount of furniture, plate, &c., I now present you with everything, furniture, linen, &c., plate, china, and glass, and all jewellery now belonging to me at No. 1, Dulwich Villas, Devonshire Road, Forest Hill. All this to be yours and yours only from this date, June 18th, 1868. This gift from your ever affectionate husband.” These articles were taken to the residence of the husband and wife, and used in the ordinary way, and at his death she claimed them. Hall, V.-C., said: “It was submitted that the husband must be taken to have intended,

knowing what the law is, to constitute himself a trustee Judgment.
for her, that being the only way of giving effect to the Armour, C.J.
paper writings, *i. e.*, as other trustees were not appointed,
he must be held to have constituted himself a trustee.
That argument appears to me to come to this, that in every
case of an imperfect gift on the part of the alleged donor,
if the gift be not effectual by reason of an incomplete transfer
of the property from the alleged donor to the intended
donee, or to some person who is to be a trustee for the
intended donee, the Court must give effect to the donation
by holding that the alleged donor was a trustee, as it must
be considered that he knew the law, and that if he did not
effectuate his object in the one way in which it would have
been valid, it must be done in another. But in truth, in
the one case as well as in the other, whether a wife or a
stranger be the object of the gift, it is manifest from the
transaction taken by itself that the alleged donor was mis-
taken as regards the proper and legal mode of effectuating
that which he intended to do. It is plain that the husband
was mistaken, and it is not necessary to impute to him that
he meant to make the gift in an ineffectual way. Looking
at the documents, they are a contradiction of any intention
on his part to do that." He then discussed and declined to
follow *Grant v. Grant*, *Richardson v. Richardson*, *Morgan v. Malleson*, *Baddeley v. Baddeley*, and *Fox v. Hawks*,
and, assuming to follow *Milroy v. Lord*, decided against
the claim.

In *Whittaker v. Whittaker*, 21 Ch. D. 657, Bacon, V.-C., said: "And the law stands clearly established that a husband may, no doubt, constitute himself a trustee for his wife of any property whatsoever, hers or his, or anything else that he has a right to deal with; but in order to do that there must be some proof furnished of a clear unequivocal determination and intention of the testator so to constitute himself a trustee. That cannot be reasonably implied from any circumstances which are not pregnant and distinct in themselves, nor without some plain statement on the part of the husband. * * With regard

Judgment. to the piano, I think it was given to the plaintiff, and I think so notwithstanding *Re Breton's Estate*, in which Armour, C.J. there was a memorandum by the husband saying, 'I this day make you a present of all my plate &c.', and so on, but that was held not to be a valid gift against the estate."

In *Finch v. Finch*, 23 Ch. D. 267, a claim was made by a widow against her husband's estate for plate alleged by her to have been given to her by her husband; the Court of Appeal, of whom was Sir G. Jessel, held, reversing Kay, J., that the evidence of the widow as to the gift was not corroborated, and decided against her claim.

In *Cochrane v. Moore*, 25 Q. B. D. 57, Benzon, the owner of a race horse called Kilworth, by words of present gift gave to the defendant one undivided fourth part of this horse. Subsequently the horse was included in a bill of sale given by Benzon to the plaintiff, to whom he was indebted. The horse was sold under the bill of sale at Tattersall's, and the defendant claimed one-fourth of the proceeds. Tattersall interpleaded, and this issue was directed to be tried. The Court held that to effect a good gift of chattels capable of delivery there must be either a deed or an actual delivery of the chattel to the donee, and proceeded: "But assuming delivery to be necessary in the case of the gift of an ordinary chattel, two questions would remain for consideration in the present case—the first, whether the undivided fourth part of the horse admits of delivery, or whether on the other hand it is to be regarded as incorporeal and incapable of tradition; the other, whether the letter written by Benzon to Yates was either a constructive delivery of this undivided fourth part of the horse, or an act perfecting the gift of this incorporeal part so far as the nature of the subject-matter of the gift admits. On these points we do not think it needful to express any decided opinion, because in our judgment what took place between Benzon and Cochrane before Benzon executed the bill of sale to Cochrane, constituted the latter a trustee for Moore of one-fourth of the horse Kilworth."

I have been unable to discover in any report of this case ^{Judgment.} any account of what did take place "between Benzon ^{Armour, C.J.} and Cochrane before Benzon executed the bill of sale to Cochrane," but it was undoubtedly by parol only. See *Cochrane v. Moore*, 5 Times L. R. 684.

The reason why Bacon, V.-C., in *Warriner v. Rogers*, and Jessel, M. R., in *Richards v. Delbridge*, disapproved of *Richardson v. Richardson* and *Morgan v. Malleson*, was because they considered them cases of incomplete gifts by reason of the donor in the former case not having indorsed the notes claimed, and by reason of the donor in the latter case not having delivered to the donee the bond claimed. And it is clear that where a gift is incomplete by reason of the want of action, or by reason of defective action on the part of the donor, the Court will not compel the donor to supply his want of action, or to remedy his defective action, for there is no equity to perfect an imperfect gift; nor where what has been said or done by the donor in respect of the gift is insufficient to constitute him a trustee of the gift for the donee, will the Court declare him to be a trustee in order to perfect the gift. This was the principle of the decisions of *Price v. Price*, *Milroy v. Lord*, and *Richards v. Delbridge*, and in the view of Bacon, V.-C., and Jessel, M. R., ought to have been the principle adopted in *Richardson v. Richardson* and *Morgan v. Malleson*.

It is quite clear from a perusal of the cases of *Price v. Price*, *Milroy v. Lord*, and *Richards v. Delbridge*, as well as from the subsequent decisions of some of those who decided those cases, that the principle laid down in them was only intended to apply to gifts which were incomplete by reason of some want of action or defective action on the part of the donor, and was not intended to apply to cases where the gift was complete on the part of the donor, but, as in the case of husband and wife, was void at law by reason of the legal incapacity of the wife to take a gift from the husband. And it is quite clear that it was not intended to apply to such latter cases, for to have so

Judgment. applied it would have been in effect to determine that a gift from a husband to a wife could never be supported in equity, although that Court had recognized and supported such gifts ever since Lord Hardwicke's time.

Armour, C.J. It is difficult to understand from the report of *Re Breton's Estate* upon what precise ground Hall, V.-C., determined that the gift there in question was incomplete; if it was upon the ground of the wife's incapacity to take a gift from her husband, he was certainly not following, as he professed to follow, any principle laid down in *Milroy v. Lord* and *Richards v. Delbridge*, and he was simply overturning what had been the law of the Court of equity from *Lucas v. Lucas* down to that time.

Jessel, M. R., who decided *Richards v. Delbridge*, certainly did not consider a gift from husband to wife incomplete by reason of the wife's incapacity to take from her husband, or he would have said so in *Finch v. Finch*, and it is apparent from what was said by Bacon, V.-C., in *Whittaker v. Whittaker*, that he did not approve of the decision in *Re Breton's Estate*.

It has, however, been followed in Ireland in *Hayes v. The Alliance B. & F. L. & F. Assurance Co.*, 8 L. R. (Irish) 149, as a decision that a gift from a husband to a wife is an incomplete gift by reason of the incapacity of the wife at law to take a gift from her husband.

The principle to be deduced from the cases above cited is at least this—which is all that is necessary for the purpose of this case—that when a husband makes a deed of land to his wife which would have been operative to pass the land had it been made to a stranger, the Court will support it by declaring him to be a trustee of the land for his wife.

This is clear, in my opinion, not only from the cases of *Baddeley v. Baddeley* and *Fox v. Hawks*, above cited, but also from the cases of *Ex parte Pye*, 18 Ves. 140; *Kekewich v. Manning*, 1 DeG. M. & G. 176; and *Richardson v. Richardson*, L. R. 3 Eq. 686, in which latter case Wood, V.-C., said, and his decision has never

been impeached on this ground: "After the decision in *Judgment. Kekewich v. Manning*, I think it is impossible to contend *Armour, C.J.* that these notes did not pass by this instrument, because the rule laid down in that case, the decision in which was supported by reference to *Ex parte Pye*, was not confined merely to this, that a person who, being entitled to a reversionary interest, or to stock standing in another's name, assigns it by a voluntary deed, thereby passes it, notwithstanding that he does not in formal terms declare himself to be trustee of the property; but it amounts to this, that an instrument executed as a present and complete assignment (not being a mere covenant to assign on a future day) is equivalent to a declaration of trust. * * The expression used by the Lords Justices is this, 'A declaration of trust is not confined to any express form of words, but may be indicated by the character of the instrument.'"

The deed in this case, with its covenants for quiet enjoyment and for further assurance, is at least as much entitled to be treated as a declaration of trust as the assignment was in that.

Had I arrived at a different conclusion from what I have done, I would have contented myself by following the decision in *Davisson v. Sage*, until reversed by an appellate Court, for since the passing of the Act 22 Vic. ch. 34, the popular idea has been that a husband could legally make a deed of land to his wife, and this Province now abounds in such deeds which it would be very mischievous to destroy: *Whitehead v. Whitehead*, 14 O. R. 621; *Jones v. McGrath*, 15 O. R. 189; *S. C.*, 16 O. R. 617. In most of the States of the Union deeds of lands from husband to wife have been upheld, and I do no more than refer to that fact, and cite some of the cases upon the subject: *Shepard v. Shepard*, 7 Johns. Chy. 57, a decision by Chancellor Kent; *Neufville v. Thomson*, 3 Edw. Chy. 92; *Deming v. Williams*, 26 Conn. 226; *Jones v. Obenchain*, 10 Gratt. 259; *Putnam v. Bicknell*, 18 Wis. 351; *Wal-lingsford v. Allen*, 10 Peters 583.

The Real Property Limitation Act did not, in my opin-

Judgment. ion, apply so as to extinguish the right of the plaintiffs to Armour, C.J. recover.

It is to be presumed that the husband, after making the deed of the lands in question to his wife, was in possession of the said lands and in receipt of the rents and profits thereof, for and on behalf of his wife; and that, upon his wife's death, he entered into possession of the said lands, and into the receipt of the rents and profits thereof, for and on behalf of his infant children and as their natural guardian. This being so, his possession and receipt were the possession and receipt of his wife, and after her death were the possession and receipt of his children, the devisees of his wife, and of those claiming under them, until his death; and the statute, therefore, never began to run.

In *Thomas v. Thomas*, 2 K. & J. 79, Page Wood, V.-C., said:—"But there is another principle which affects this case, namely, that possession is never considered adverse if it can be referred to a lawful title. * * In this case a father who had several children entitled to estates on the death of his wife, all the children being under age at that time, entered upon the estates. I am of opinion that, *primâ facie*, unless there were strong evidence to the contrary, his entry must be taken to be on behalf of his infant children and as their natural guardian--the guardian in socage of the plaintiff he could not be, for such guardianship terminates when the child attains fourteen years of age; but considering the right of the father as the natural guardian of the infant plaintiff, and the practice of this Court in making allowances for maintenance, he having entered and received the rents and profits, and there being no evidence of his not having discharged the obligation imposed upon him of maintaining his children, remembering the fact that they were all under his own charge and were infants, I think that I must reasonably infer that the entry was an entry on their behalf and as their guardian, and was totally different from the case of a mere stranger entering upon property under similar circumstances. Then it is said that,

though the entry might have been lawful in its inception, ^{Judgment.} the retention of the property after the children attained ^{Armour, C.J.} twenty-one barred their right under the Statute of Limitations; but I think the better and sounder view here is that if this gentleman entered as guardian, this Court would never allow him to set up any other title to the estate."

This case of *Thomas v. Thomas* and the cases of *Stone v. Godfrey*, 5 DeG. M. & G. 76; *Williams v. Pott*, L. R. 12 Eq. 149; *Burdick v. Garrick*, L. R. 5 Ch. 233; *Wall v. Stanwick*, 34 Ch. D. 763; *In re Hobbs*, 36 Ch. D. 553; and *Lyell v. Kennedy*, 14 App. Cas. 437, establish the principle that if a person as bailiff, servant, agent, attorney, caretaker, guardian (whether natural or statutory) or in any other fiduciary character, enters into the possession of lands or into the receipt of the rents and profits thereof for and on behalf of the owner, the possession or receipt of such person is the possession and receipt of the owner and of those claiming under him; and the possession or receipt of such person, so long as he continues in such possession or receipt, is to be ascribed to the character under which he entered into such possession or receipt, and he cannot denude or divest himself of such character except by going out of such possession or receipt and delivering up such possession or receipt to the owner or to those claiming under him.

There are two cases, however, opposed to the principle so laid down: *Hickey v. Stover*, 11 O. R. 106, a decision of the Chancery Divisional Court, and *Clark v. McDonnell*, a decision of the Common Pleas Divisional Court, not yet reported (a). The former case was decided before the decisions in *Wall v. Stanwick*, *In re Hobbs*, and *Lyell v. Kennedy*, and the latter after them. These cases were wrongly decided if the cases to which I have referred were rightly decided, and I am of opinion that they were. The plaintiffs are, in my opinion, entitled to judgment for the lands in question, with the costs of the action and of this motion.

(a) Reported *post*.

Judgment. STREET, J. :—

Street, J.

This was a motion on the part of the plaintiffs to set aside the judgment of the Chancellor, reported 20 O. R. 158, dismissing the action so far as it relates to the lots on Kent street, in the city of London, therein referred to as lots 7 and 8, and to enter judgment for the plaintiffs as to that property as well as for the other lands claimed.

The facts of the case appear in the report of the judgment in 20 O. R. 158.

The question in this case turns on the effect to be given to a deed executed 16th November, 1870, which on its face purports to be a conveyance for a nominal consideration from Charles W. Kent to his wife, Catharine Kent, of the lands on Kent street claimed by the plaintiffs in this action.

Catharine Kent and Charles W. Kent were married on the 10th April, 1854, without any marriage settlement. It is argued for the plaintiffs: first, that the conveyance is good between the parties under the Married Woman's Property Act of 1859, as a conveyance of the legal and equitable estate; second, that it is good as constituting the husband a trustee for his wife so as to vest the equitable estate in her. The third question was also discussed as to whether, supposing the husband to be a trustee for his wife, the effect of the conveyance was to make him a trustee for her separate use or not. In order properly to dispose of the questions which arise, it is necessary to consider the position of a married woman before the Act above mentioned was passed, that is to say, her position under the common law.

Marriage, according to the theory of English law, had the effect of suspending the independent legal existence of the woman. Man and wife became, and during the continuance of the coverture remained, one person, and that person was the husband. Upon marriage, the woman's property became subject to the same process of absorption as her legal existence. By the common law, and independently of any contract to the contrary, the whole of

the real and personal property of the wife vested upon marriage in the husband, either absolutely or during the coverture: Redman on Husband and Wife, pp. 4 and 5.

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Street, J.

As a result of the absence of any separate legal existence, a conveyance from husband to wife of lands was inoperative.

"A man may not grant nor give his tenements to his wife during the coverture, for that his wife and he be but one person in the law:" Littleton, sec. 168; and in *Firebrass v. Pennant*, 2 Wils. 254, where the validity of a voluntary grant by a lord of a manor of copy-hold lands immediately to his wife was in question in the year 1764, the Court say: "As this was a provision by a husband for his wife, we should be glad, if possible, to get over that maxim in law, 'that a husband and wife are one person, and therefore cannot grant land to one another; so where there is no particular custom in a manor, the common law must take place; this is an original voluntary grant by the husband to the wife, who cannot by law take immediately from him, any more than a monk who is dead in law, and considered as no person; so here is no person to take, for the wife and husband are only one person. We are dealing with a fundamental maxim of the common law, and might as well repeal the first section of Littleton, as determine this grant from the husband immediately to the wife to be good, and where there is not so much as the shadow of a person intervening." See also *Phillips v. Bärnet*, 1 Q. B. D. 436.

In equity, however, the separate existence of the wife, both as regards her rights and liabilities, had long been recognized; any person, whether her husband or not, might give real or personal property to her or to trustees for her for her separate use, and might by doing so confer upon her the right to deal with the equitable estate by will or conveyance without the consent of her husband and free from his control. Where trustees were not interposed, but the gift was directly to the wife for her separate use, the Courts have long been in the habit of carrying into

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effect the clearly expressed intention of the giver by converting the husband into a trustee for the wife. The propriety of doing this was doubted by Lord Cowper in *Harvey v. Harvey*, 1 P. Wms. 125, where the question seems first to have been raised, but in the subsequent case of *Bennet v. Davis*, 2 P. Wms. 316, decided in 1725, it was done. In that case there was a devise of lands to a wife for her separate use without appointing trustees; the husband became bankrupt, and the assignee claimed to hold the lands in question during the coverture for the benefit of the creditors of the husband. The Master of the Rolls "took it to be a clear case that it was a trust in the husband, and that there was no difference where the trust was created by the act of the party and where by the act of law. If I should devise that my lands should be charged with debts or legacies, my heir taking such lands by descent would be but a trustee, and no remedy for these debts or legacies but in equity; so in the principal case, there being an apparent intention and express declaration that the wife should enjoy these lands to her separate use, by that means the husband, who would otherwise be entitled to take the profits in his own right during the coverture, is now debarred, and made a trustee for his wife."

This case has been repeatedly followed; see *Parker v. Brooke*, 9 Ves. 583; *Rich v. Cockell*, *ib.* 369; *Newlands v. Paynter*, 10 Sim. 377. The same rule is applicable to gifts by the husband to the wife where he divests himself of the property and shews unequivocally an intention to hold it as trustee for his wife.

This being the state of the law, the Married Woman's Property Act of 1859 was passed, now embodied in R. S. O. ch. 132, sec. 4, sub-secs. 1 and 4; it is with the former of those sub-sections, as referring to women married before 4th May, 1859, that I have here to deal. It is as follows: "Every woman married on or before the 4th day of May, 1859, without any marriage contract or settlement, shall and may, from and after the said day, notwithstanding her coverture, have, hold, and enjoy all her real estate not on or before

the said 4th day of May taken possession of by her husband, by himself or his tenants, and all her personal property not on or before said day reduced into the possession of her husband, whether belonging to her before marriage or in any way acquired by her after marriage, free from his debts and obligations contracted after the said 4th day of May, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried.”

Judgment.
Street, J.

In *Leys v. McPherson*, 17 C. P. at p. 273, it was said by Adam Wilson, J., that “the effect of this Act is to establish that independent personality of a *feme covert* concerning her own estate, which had long prevailed in Courts of equity with respect to property settled to her separate use.”

It gave to the wife the right to the use and enjoyment of her own property during her life, and it took away from the husband the right to take away from his wife that which was hers when he married her and that which came to her during the coverture. The argument is that because it did this, and gave to her certain rights which had been taken away from her by the fiction of the unity of person of husband and wife, therefore that unity must also be held to have been abolished.

I do not see any reason here for giving to this statute a meaning beyond that which is conveyed by the language used, because that seems to me sufficient to cover all that I can find to have been intended. The matter seems to stand thus: before the Act was passed a principle of long standing had existed that a husband and wife were one person; several results had flowed from this principle, of which I need only name two, that property belonging to the wife before her marriage or acquired during coverture vested in the husband, and that a husband could not convey direct to his wife; then the Act was passed, which expressly declared that the wife might hold her own property, but did not provide that her husband might convey to her; this recognized the wife as separate

Judgment. from her husband to the extent of enabling her to hold
Street, J. property, but did not further alter the common law, in my opinion.

The views of the Judges in the English Courts have not been uniform. Mr. Justice Chitty in *Re March*, 24 Ch. D. 222, was of opinion that the result of the statute which gave the wife the control of her own property was to effect a complete severance of the unity of husband and wife; in the Court of Appeal that case went off on another point: 27 Ch. D. 166. The point again came up in *Re Jupp*, 39 Ch. D. 148, when Mr. Justice Kay expressed his view as being that the principle of the unity of husband and wife remained unaffected; and in *Butler v. Butler*, 14 Q. B. D. at p. 835, Wills, J., expressed a similar opinion.

In this state of the authorities there is nothing to prevent our holding that the Act of 1859 left the principle of the unity of husband and wife untouched, and that the conveyance from Charles Kent to his wife did not pass the legal estate to her, and I think we should so hold.

Then arises the question whether it passed the equitable estate to her.

The principle established by the authorities is that which is formulated by Sir R. P. Arden, the Master of the Rolls, in *McLean v. Longlands*, 5 Ves. 78, in the year 1799. He there says that in order to effect a valid gift from husband to wife, "nothing less would do than a clear irrevocable gift either to some person as a trustee, or by some clear and distinct act of his, by which he divested himself of his property, and engaged to hold it as trustee for the separate use of his wife."

The many cases upon the point since this statement of the law have, I think, without exception, recognized its correctness, but there has been a wide diversity of opinion as to what are the acts which should be held sufficient to shew that the husband has engaged to hold property as trustee for the separate use of the wife.

As between strangers the correctness of the rule laid down in *Milroy v. Lord*, 4 DeG. F. & J. 264, and approved

by Sir George Jessel, M. R., in *Richards v. Delbridge*, L. R. 18 Eq. 11, is not disputed: "A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning; for *however anxious the Court may be to carry out a man's intention*, it is not at liberty to construe words otherwise than according to their proper meaning.

* * The true distinction appears to me to be plain, and beyond dispute: for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift shew an intention to give over property to another, and not to retain it in the donor's hands for any purpose, fiduciary or otherwise. * * If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

I confess I am unable to find any satisfactory ground apart from the authorities upon which to hold that this reasoning should not apply to a transfer from a husband to his wife as well as to a transfer from him to a stranger, because in either case the question is one of the intention to be gathered from the form which is used, and language has the same meaning whether it is used by a husband to his wife or to a stranger. If he says "I give you this," he

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Judgment. means that what he is giving shall pass, if at all, by immediate transfer; he does not mean "I declare myself a trustee of this for you" any more when addressing his wife than when addressing a stranger.

Street, J.

But the maintenance of the equitable doctrine of the separate existence and right of property of married women has from the very nature of the legal rights of the husband rendered it necessary that he should be constituted a trustee for her of her separate property whenever no other trustee was named; his intention and his consent to become a trustee for her were equally unnecessary; when once it was established that a gift of property had been made to the wife, whether by her husband or by a stranger, he became a trustee of it in spite of himself, for the reason that otherwise he must have been held to be absolute owner of it; as it is put by Lord Langdale in *Tullett v. Armstrong*, 1 Beav. 1, at p. 21, in speaking of a wife's separate estate: "The property may be acquired, either by contract with the husband before the marriage, or by gift from him, or from any stranger wholly independent of such contract; so far as his legal rights as husband may interfere, the Court will treat him as a trustee." And accordingly we find an almost uninterrupted line of cases, beginning I think in 1684 with *Bletsow v. Sawyer*, 1 Vern. 244, down to the present time, in which the principle is either recognized or acted upon, that a husband may make a valid gift directly to his wife for her separate use, and that whether the gift is from him or from a stranger he will if necessary be treated as a trustee for her. Many of these cases are referred to in the judgment of the Chief Justice. I may add to the list *Slanning v. Style*, 3 P. Wms. 334; *Bennet v. Davis*, 2 P. Wms. 316; *Fettiplace v. Gorges*, 1 Ves. Jr. 46; *Rich v. Cockell*, 9 Ves. 369; *Parker v. Brooke*, 9 Ves. 583; *Lucas v. Lucas*, 1 Atk. 270.

Every gift from a husband to his wife without the intervention of a trustee being of necessity imperfect under the law before the recent Married Women's Acts, in the sense that the legal estate remained in the husband, such

gifts had, nevertheless, for upwards of two hundred years been sustained wherever there was satisfactory proof of their having been made. It was then, I think, too late to say that a gift from a husband to his wife was imperfect and could not be upheld because the husband had used words of immediate transfer, instead of words declaring himself a trustee; and, therefore, I think that the decision of Hall, V.-C., in *Re Breton's Estate*, 17 Ch. D. 416, should not be treated as a binding authority, because it is in opposition to the law as it had been previously well settled. And following the principle of the line of cases to which I have referred, and the decision of Strong, V.-C., in *Davisson v. Sage*, 20 Gr. 115, and the other cases in this Province referred to by the Chancellor in his judgment in the present case, I think we are bound to hold that the deed by which Charles W. Kent purported to pass the land in question to his wife is a clear, unequivocal, and irrevocable act by which he gave to her for her separate use the whole equitable estate, and that he became a trustee for her of the legal estate, which only remained in him. The conveyance contains the usual statutory forms of covenant, which, in the strongest manner, and to an extent amply sufficient to create a separate estate, free the property from the control of the husband.

Judgment.
Street, J.

I find myself obliged, however, with great deference, to differ from the Chancellor in the results flowing from the conclusion that Catharine Kent became entitled to an estate in fee simple for her separate use under the conveyance in question. He has treated the possession of Charles W. Kent from the time of the death of his wife in 1872, as being adverse to his children, her heirs-at-law; the law undoubtedly being that a husband is not entitled to curtesy in his wife's separate estate which she has devised away from him. The possession of Charles W. Kent from the date of the conveyance should, I think, be treated as that of his wife and not as a possession adverse to her, and the Chancellor does not treat it as a possession which was wrongful down to the time of her death, but he does

Judgment. treat it as adverse to the infants from that time. I think the authorities shew that he must be taken to have entered upon her death upon the land in question as the bailiff for his children, who were entitled as devisees of his wife to the equitable estate in fee, and who were infants at the time of their mother's death : *Morgan v. Morgan*, 1 Atk. 489 ; *Blomfield v. Eyre*, 8 Beav. 250 ; *Thomas v. Thomas*, 2 K. & J. 79 ; *Wall v. Stanwick*, 34 Ch. D. 763 ; *In re Hobbs*, 36 Ch. D. 553 ; *Quinton v. Frith*, Ir. R. 2 Eq. 396 ; *Pelly v. Bascombe*, 4 Giff. 390, and in appeal, 34 L. J. Ch. 233 ; and having entered in that capacity he must be taken to have continued in possession in the same capacity until his death, because there is no evidence that he ever renounced it, or that he can acquire a new possession in any other character.

Williams v. Pott, L. R. 12 Eq. 149, is a strong example of this principle. Howell Jones Williams died in 1848, was tenant in tail of the land in question ; he never barred the estate tail, but devised the land to his wife. At his death his eldest son, Walter Jones Williams, was entitled, but he entered into the land in the character of agent for his mother, and continued to receive rents in that character down to his death in 1866, after which the mother continued to receive them until she died in 1869. It was held that the possession must be taken to have been hers all the time from her husband's death, although her son, who had actually received the rents, was the true owner. Lord Romilly, M. R., says the son could not have made an entry as long as he was in the position of agent for his mother, and that he was not in possession, and could not get into possession, or make any entry for that purpose, without first resigning his position as her agent ; and then he must have written to his mother saying : " The property is mine ; I claim the rents, and I shall apply the rents for my own purposes ; " and thereupon he might have made an entry, and so would have altered the position of principal and agent.

In *Howard v. Earl of Shrewsbury*, L. R. 17 Eq. at p.

401, Sir George Jessel, M. R., after reviewing many of the cases to that time, states the result of them as being "that an infant is entitled to treat a stranger who takes possession of his estate as his 'bailiff' or agent, to get, if he likes, from him an account of the rents and profits, and a decree for possession."

Judgment.

Street, J.

Wall v. Stanwick, 34 Ch. D. 763, and *In re Hobbs*, 36 Ch. D. 553, are also express authorities shewing that the father here must be taken to have continued in possession in the character of bailiff, notwithstanding the marriage of one of his children and the coming of age of the other.

In *Hickey v. Stover*, 11 O. R. 106, it was held by the Divisional Court of the Chancery Division that the Statute of Limitations began to run in favour of a guardian who had had in his possession lands of a child, and against the child, from the time the child attained the age of twenty-one years. This decision has since been followed by the Divisional Court of the Common Pleas Division in an unreported case of *Clark v. McDonnell*, decided in 1890, in which they overrule the decision of the trial Judge, the Chief Justice of this Division.

If *Hickey v. Stover* and *Clark v. McDonnell* were well decided, the result must be that the plaintiff Henry H. Butt in the present case must be declared to be barred by the Statute of Limitations, because his mother, Margaret C. Butt, a daughter of Caroline Kent, deceased, attained the age of twenty-one years in 1876, and the statute would then begin to run, and her heir-at-law, Henry H. Butt, claiming under her, would be barred, notwithstanding his infancy in 1876. The other plaintiff, Catharine Amelia Kent, did not come of age until 1881, so that she would not be barred whether the statute began to run against her when she became of age or not until her father's death.

We are therefore compelled to decide whether we shall follow the decisions in *Hickey v. Stover* and *Clark v. McDonnell*, or the English decisions to which I have referred.

Hickey v. Stover was decided before the cases of *Wall v.*

Judgment. *Stanwick* and *In re Hobbs*, and also before the late decision of *Lyell v. Kennedy*, 14 App. Cas. 437, which strongly, I think, supports them in principle. *Clark v. McDonnell*, although since these late cases, is based upon *Hickey v. Stover*. In this state of the authorities I feel at liberty to follow the English cases and to hold that Charles W. Kent did not cease to hold the position of bailiff for his children until his death.

The result is that, in my opinion, the legal estate remained in Charles W. Kent; that he must be deemed to have been trustee of it for his wife; that the whole equitable estate became vested in the wife for her separate use, and passed to her children by her will; that upon the death of Margaret, one of these children, her undivided half descended to her heir-at-law, the plaintiff Henry H. Butt; and that he and the other child, the plaintiff Catharine A. Kent, now are entitled to an order vesting the legal and equitable estate in them as tenants in common, and to the possession; they should also have the costs of the action and of the motion.

[CHANCERY DIVISION.]

RE LYNN.

LYNN V. THE TORONTO GENERAL TRUSTS COMPANY.

Life insurance—Devise—Insurance certificate or policy—Will or declaration under R. S. O. ch. 136, sec. 5.

A testator by his will devised an insurance certificate or policy to the defendants as his executors for the benefit of his wife and children :—
Held, that the will was a sufficient declaration under R. S. O. ch. 136, sec. 5, and that creditors were not entitled to the proceeds.

THIS was an application made by Mary Josephine Lynn ^{Statement.} as a creditor, against the Toronto General Trusts Company as the executors of the will of George Michael Lynn, deceased, for the administration of his estate.

The motion was argued on March 16th, 1891, before Boyd C.

It appeared that George Michael Lynn, in his lifetime, domiciled in Ontario, was a member of the "Northwestern Masonic Aid Association," a benefit association doing business in the United States of America, and as such held a policy or certificate dated 27th November, 1889, payable by said association in these terms : " Does promise and agree to pay to his devisees, or if no will specifically bequeathing the money which shall be payable on account of this certificate shall appear and be brought to the knowledge of this association within sixty days after the death of the said George M. Lynn, then to the heirs of the said George M. Lynn within ninety days after receipt of satisfactory evidence of the death of said George M. Lynn, etc."

By his will, dated 3rd June, 1890, he devised all his real and personal estate including his insurance in the "Northwestern Masonic Aid Association," to his executors for the benefit of his wife and children, and died 7th July, 1890.

Argument.

The only other property he had was two certificates or policies of insurance in other associations which had been drawn payable on their face for the benefit of his wife and children.

Huson Murray, Q. C., for the creditor. The only property available for creditors is the certificate in the "Northwestern Masonic Aid Association," as the other two certificates were made payable for the benefit of the deceased's wife and children. The certificate in question was issued in the name of the deceased himself, and no indorsement was made on it, nor was any separate declaration made that it was for the benefit of his wife or children or any of them under R. S. O. ch. 136 sec. 5. It is true he has so disposed of it by his will, but that is not a sufficient declaration under the statute as it is an instrument he could revoke at any time.

E. T. Malone, for the company as executors. The proceeds of the certificate are not assets in the hands of the executors for creditors. The will specifically devised the certificate to the company to hold, as trustees, for his wife and children, and was a sufficient declaration under the statute. The proceeds of the certificate were payable in the State of Illinois, and were held by the association there for the benefit of the beneficiaries, the wife and children, according to the laws of that State, and were not assets which creditors could claim. The object of the association was for the benefit of widows and children, and if creditors could claim the proceeds the whole object of the association would fail: *Worley v. Northwestern Masonic Aid Association*, 10 Fed. Rep. 227; *McClure v. Johnson*, 10 N. W. Rep. 217.

Murray, Q. C., in reply. The testator being domiciled in Ontario the law of this country governs: *McConnell v. McConnell*, 18 O. R. 36; *Hanrahan v. Hanrahan*, 19 O. R. 396.

March 17, 1891.—BOYD, C.:—

Upon the American decisions cited, the proceeds of this certificate of insurance would be clearly not assets of the

deceased's estate, for the satisfaction of creditors. I am not at present prepared to decide that such would be the result as to Canadian creditors of the person insured domiciled in Ontario, before and during the currency of the policy. But the matter falls to be decided, not merely upon the certificate *per se*, but upon that coupled with the provisions in the will which relate expressly to this insurance claim. The will gives the Northwestern Masonic Aid Association certificate (*inter alia*) to his executors to hold in trust for his wife and his children, as therein at great length set forth. A period of division is fixed upon which the whole goes absolutely to the children. So far as benefits are bestowed upon the wife and children, I think creditors are excluded; and these benefits now exhaust all the income, and will probably also extend in due course to the corpus. This result I reach by virtue of section 5 of the Act to secure to wives and children the benefit of insurance; R. S. O. 136.

Judgment.

Boyd, C.

Pursuant thereto, if the man has by any writing identifying the policy by its number or otherwise, made a declaration that the policy is for the benefit of his wife or of his wife and children or any of them, such policy shall enure and be deemed a trust for these and shall not be subject to the control of the husband or his creditors or form part of his estate when the sum secured becomes payable.

I think the will of the insured as framed satisfies this provision; it by name identifies the particular insurance, it is in writing and it is declaratory of these benefits for his family. It may be suggested that the statute is not satisfied by the execution of a revocable instrument, and that the declaration like an indorsement on the policy should be in its character final, but the statute as amended by 53 Vict. ch. 39, sec. 6 (O.), shews that the declaration is subject to variation and correction at the will of the insured within the limits of the statute.

This is not a case for costs against the applicant.

G. A. B.

[COMMON PLEAS DIVISION.]

FORSYTH V. CANNIFF AND THE CORPORATION OF THE
CITY OF TORONTO.

*Municipal corporations—Medical health officer—Liability of city for acts of
—Master and servant.*

Held, that the medical health officer of a municipal corporation appointed under R. S. O. ch. 205, sec. 47, is not a servant of the corporation so as to make them liable for his acts done in pursuance of his statutory duties.

Statement. THIS was an action tried before STREET, J., and a jury, at Toronto, at the Autumn Assizes of 1890.

The action was brought against the defendant Canniff for an act done by him as Medical Health Officer of the city of Toronto, and against the city, on the ground that the act complained of was done by him as their servant.

The injury complained of was, that the defendant Canniff, by false and injurious representations as to the milk sold by the plaintiff had done him a serious injury.

The representation was that milk sold by the plaintiff, and inspected by the defendant Canniff in his capacity of Medical Health Officer, was impure. It was proved that the defendant, though he acted in good faith, had made a mistake, and that the milk was perfectly good.

Judgment was entered against both defendants. A motion was made on behalf of the city to set aside the judgment entered for the plaintiff and to enter the judgment for the city.

No motion was made on behalf of the defendant Canniff. In Michaelmas Sittings, November 22nd, 1890, *Biggar*, Q. C., and *Mowat*, supported the motion.

Burns, contra.

December 20, 1890. GALT. C. J. :—

Judgment.

Galt, C.J.

There is no doubt the action taken by Dr. Canniff inflicted an injury on the plaintiff; and that, although he acted in perfect good faith, the course pursued by him was one which was improper. There is no motion by him against the verdict.

The question now before us is, whether the city is responsible for what was done by Dr. Canniff acting as medical health officer.

By section 47 of R. S. O., ch. 205, any municipal council may appoint a medical health officer whose powers are defined by the statute. By section 113, power is conferred on every municipality for which there is a medical health officer, to pass by-laws regulating the duties of medical health officers; and it is manifest that it is in respect only to such duties he can be said to be an officer of the corporation.

In Dillon on Municipal Corporations, 4th ed., sec. 977, p. 1200, it is stated: "The power or even duty on part of a municipal corporation to make provision for the public health and for the care of the sick and destitute, appertains to it in its public and not corporate, or, as it sometimes called, private capacity."

The law on this subject is summed up in Wood on Master and Servant, 2nd ed., p. 927: "The same rule of liability prevails, in all respects, as to the liability of a municipal corporation for the acts of its servants, in a matter *intra vires*, as prevails in reference to individuals. The simple question in each case is, whether the person whose act is complained of was a servant of the corporation, and whether the work upon which he was employed was within the scope of municipal authority."

To apply that rule to the present case.

Dr. Canniff was appointed medical health officer under the provisions of the statute, but the duty he was called upon to perform had no reference to what may be called "the corporation," his duties had reference to the health

Judgment.
Galt, C.J.

not to the property of the inhabitants ; and if he had not been appointed by the municipal council, he might have been by the Lieutenant-Governor. He made a mistake in the discharge of his duty for which he is personally responsible, but the corporation is not.

The rule will be absolute to set aside the judgment against the city with costs.

ROSE, J., :—

I concur in the judgment just delivered by the learned Chief Justice.

The point is, I think, decided in *Re Macfie v. Hutchinson*, 12 P. R. 167, where, although the learned Chief Justice Sir Adam Wilson dissented from the conclusion arrived at by the other members of the Court, he agreed that a medical health officer was not a servant of the corporation.

In addition to the references appearing in the judgment of the learned Chief Justice of this Division, I would refer to pp. 915 to 927, of 2nd ed. Wood on Master and Servant, and pp. 1193 to 1200 of the 4th ed. of Dillon on Municipal Corporations.

Section 99 of ch. 205, R. S. O., shews that the duty of the medical health officer to inspect milk exposed for sale, is statutory.

[COMMON PLEAS DIVISION.]

REGINA V. HARTLEY.

Intoxicating liquors—Liquor License Act—R. S. O. ch. 194, secs. 70, 105—Minute of conviction—Conviction not in accordance with—Validity.

A minute of a conviction for selling liquor without a license in contravention of sec. 70, of the Liquor License Act, R. S. O. ch. 194, stated that in default of payment of the fine and costs imposed, the same was to be levied by distress, and in default of distress imprisonment, and a formal conviction was drawn up following the minute:—

Held, that under sec. 70, distress was not authorized; but that the fact of the minute containing such provision, did not prevent a conviction omitting such provision being drawn up and returned, in compliance with a *certiorari* granted.

Regina v. Brady 12 O. R. 358, and *Regina v. Higgins*, 18 O. R. 148, considered.

Held, also, that the conviction was good under sec. 105 of the said Act.

THIS was a motion to make absolute an order *nisi* to ~~Statement.~~ quash a conviction for selling liquor without a license, under the Liquor License Act, R. S. O. ch. 194, sec. 70, which provides for the infliction of a penalty of not less than \$50 besides costs, and not more than \$100 besides costs; and, in default of payment, for imprisonment for a period of not less than three months.

The defendant was convicted on his own confession, and the following minute of conviction was made by the magistrates: "And for his said offence we adjudge him to forfeit and pay the sum of \$50, and to pay to John Danson, the complainant, the sum of \$13.85 for his costs in this behalf; and if the said sums are not paid in ten days that the said sums be levied by distress and sale of the goods and chattels; and in case of no sufficient distress we order the said Thomas Hartley to be imprisoned in the common jail for the space of three months."

A formal conviction was drawn up and signed by the magistrates, following the minute, when a *certiorari* was obtained; and on its return the magistrates returned a conviction following the minute, save that it omitted the provision for distress, and directed the payment of the fine and costs, and provided that in default of payment the defendant should be imprisoned for three months.

Judgment
Rose, J.

In Easter Sittings May 22nd, 1890, *Aylesworth*, Q. C., supported the motion.

Langton, Q. C., contra.

December 20, 1890. ROSE, J. :—

It was contended before us that the first conviction was invalid, there being no power to levy a distress.

Secondly, that the second conviction returned with the *certiorari* was invalid in that it did not follow the adjudication.

A third ground was taken as to the costs being excessive, but was not urged before us.

I think it is clear that there is no power to enforce the payment of the fine and costs by distress under section 70 : that, in default of payment, imprisonment follows; and that section 88 of the same Act, which provides for the recovery of penalties by distress does not apply to section 70 : indeed it was not contended that it did.

Section 88, it will be observed, provides for recovery of penalties by distress, and in case of no sufficient distress, then, in cases not otherwise provided for by this Act, imprisonment not exceeding thirty days. Such provisions are in my view inconsistent with the provisions of section 70 and inapplicable to cases governed by that section.

Section 88 has been repealed ; (See 53 Vict. ch. 56 (O.) 1890), as also has section 71, and a new section has been substituted for 71 ; but the repealing Act does not take effect until the 1st of January, 1891.

The minute of conviction and first formal conviction drawn up thereon therefore clearly contain a provision in excess of the jurisdiction of the magistrates; and such conviction could not be upheld.

The sole question for consideration is, whether the second conviction returned with the *certiorari* can be sustained without an amendment of the adjudication or minute of conviction.

The minute of conviction is required by sec. 53, of R. S.

C. ch. 178, the Summary Convictions Act, and but made imperative what had been the practice of justices prior to the passing of the Summary Convictions Act of 1848 in England.

Judgment.

Rose, J.

The history of the proceedings and of the legislation may be found in the 6th edition of Paley on Convictions, p. 302.

Prior to the passing of the Summary Convictions Act of 1848 a formal conviction was permitted to be drawn up remedying defects at any time before it was acted upon, or before the return of the *certiorari*, although after a commitment; or after a penalty had been levied by distress; or after action brought against a magistrate; or even after the conviction had been returned to the sessions (see page 304); and it was also determined that even after the defendant had been furnished with a copy of the minute of conviction the magistrate was permitted to draw up and return a conviction in formal shape, which conviction was to be taken as the only authentic record of the proceedings.

I do not think that the provision of section 53 requiring the minute or memorandum to be made gives any greater force or validity to that minute or memorandum than it had theretofore. It was, as I understand, a mere memorandum from which the formal conviction might thereafter be drawn up, and also for the convenience of the party convicted so that he might obtain a copy of the minute showing for what he was convicted and the punishment awarded, so as to enable him to give notice of appeal.

It seems to me certainly not to occupy any higher position than the conviction drawn therefrom; indeed in the case of *Jones v. Williams*, 36 L. T. N. S. p. 559, it was held upon a case stated under 20 & 21 Vict. ch. 43 that until the formal conviction was drawn up there remained to the magistrates a *locus penitentie* in which they might change their minds.

No point is made in that case of whether there was or was not a minute of conviction.

Judgment.

Rose, J.

In *Regina v. Smith*, 46 U. C. R. 442, my learned brother Osler held that he could take notice only of the conviction that was returned with the *certiorari*, it appearing to be in all respects regular and sufficient in form, and declined to quash the conviction for a variance between the minute and formal conviction.

In *Regina v. Walsh*, 2 O. R. 206, Cameron, J., held that the second or amended conviction was defective in not following the actual adjudication of the magistrate as to costs; but there the minute of conviction or adjudication shewed the costs to be \$5.20, while the conviction drawn up thereon shewed the costs to be \$5.27; and I take it that all the learned Judge there determined was that it appearing that the magistrate had fixed the costs at the sum of \$5.20, there was no power to issue a conviction requiring the defendant to pay a sum exceeding that which had already been adjudged. I followed that decision in *Regina v. Elliott*, 12 O. R. 524.

In *Regina v. Bennett*, 3 O. R. 45, Armour, J., reviews a large number of authorities and refers to the case of *Chaney v. Payne*, 1 Q. B. 712, where Lord Denman, C. J., said that the cases therein referred to established clearly that the "magistrates are not bound by the conviction first drawn up, *whether it be merely a note of the conviction or drawn up in a formal manner as the conviction itself*; but that they are at liberty, when called upon by appeal to return the conviction to the Quarter Sessions, or by *certiorari* into this Court, to draw up and return a more formal conviction, correcting any errors which may have existed in that first drawn up, provided the latter conviction be according to the truth and the facts of the case as proved before the magistrates."

In *McLellan v. McKinnon*, 1 O. R. 219, at p. 238, the same learned Judge points out that "the record of conviction may be said generally to contain two adjudications; the one the adjudication of guilt, or conviction properly so called; and the other the adjudication of punishment, or sentence properly so called."

It may be, and I am of the opinion that it is so, that when the magistrate has exercised his judgment or discretion, and has nominated the fine and fixed the term of imprisonment, as in this case, both being within his discretion, the formal conviction must follow the adjudication because it must be in accordance with the fact, and the fact is as shewn by the minute of conviction ; and that, in order to vary the fine or the imprisonment, it would be necessary to have a new adjudication which possibly, as pointed out by Wilson, C. J., in *Regina v. Brady*, 12 O. R. 358, at p. 363, could only be changed by the magistrate in the presence of the defendant, such change being in effect a new judgment. I confess I entertain a strong doubt as to the power of the Court to amend the adjudication.

Judgment.

Rose, J.

In that case the learned Chief Justice held that the conviction which varied from the actual adjudication in directing distress in the case of non-payment of the penalty which was not in the adjudication, was not supportable without an amendment of the adjudication.

It is not necessary to say whether I agree to that conclusion or not ; it may hereafter become necessary to further consider such question and I merely desire to keep myself free for such a consideration if the necessity should arise, because there is a clear distinction between the facts of that case and the one before us, namely that in *Regina v. Brady*, the conviction contained a provision which was not in the adjudication, while in the case before us the adjudication contained a provision which is not found in the conviction, and that which was in the adjudication and not in the conviction was something which, in my opinion, the magistrates had no power to deal with, was an act beyond their jurisdiction and should not have been dealt with by them. It may be that the distinction is rather one of fact than of principle.

My learned brother MacMahon, in *Regina v. Higgins*, 18 O. R. 148, followed *Regina v. Brady*, as to this question ; but as I understand from consultation with my learned brother, so far as it may be considered that *Regina v.*

Judgment. *Brady*, is in conflict with the opinion which I am now
Rose, J. expressing, my learned brother agrees with me that we should not follow it.

I am therefore, as a result of the consideration of the authorities, of the opinion that the minute of conviction drawn up in this case did not prevent the drawing up of a formal conviction omitting the provision as to distress which the magistrates had no power to insert. It would seem absurd to say that if instead of drawing up a minute of conviction they had drawn up a formal conviction, that that conviction might have been practically replaced by another formal conviction leaving out that which was illegal in the first conviction, and yet that it would be impossible for the magistrates to draw up a formal conviction in proper form merely because they had a provision in the minute of conviction or adjudication which they had no power to insert.

But there is another difficulty in the defendant's way. Section 105 of the Liquor License Act provides that "No conviction * * under this Act shall be held insufficient or invalid * * by reason of any other defect in form or substance, provided that it can be understood from such conviction * * that the same was made for an offence against some provision of this Act, within the jurisdiction of the * * justices * * who made or signed the same, and provided there is evidence to prove such offence, and no greater penalty or punishment is imposed than is authorised by this Act."

Now, the conviction produced before us is such that we can understand from it that the same was made for an offence against a provision of this Act within the jurisdiction of the justices, and there is evidence to prove the offence, and no greater penalty or punishment is imposed by the conviction than is authorized by this Act. We are therefore prohibited by the Act from holding that the conviction is insufficient or invalid by reason of a defect in form or substance, and the variation of the conviction from the minute of the conviction is, of course, a defect of either form or substance.

Mr. Aylesworth also called our attention to the fact that the offence was charged as being committed between the first and fourteenth of the month, but it is clear that that is not a valid objection. See *Regina v. Wallace*, 4 O. R. 207, and Paley on Convictions, 6th ed., 202 *et seq.*

Judgment.
Rose, J.

The application fails and must be dismissed with costs.

GALT, C.J., and MACMAHON, J., concurred.

[COMMON PLEAS DIVISION.]

THE CORPORATION OF THE COUNTY OF MIDDLESEX v.
SMALLMAN.

Registry laws—Principal and surety—Duties of registrars—Bond for performance of—Payment of proportion of fees to municipality—Liability of sureties—R. S. O. ch. 114, sec. 107.

Held, that the sureties to a bond, dated 8th January, 1886, given in accordance with Schedule A of the Registry Act, R. S. O. ch. 114, for the performance of the duties, etc., of the registrar, being the form of bond prescribed by the Act in force prior to the introduction of the provisions giving to municipalities a share in the fees, were not liable for the non-payment over of such share.

Decision of STREET, J., 19 O. R. 349, affirmed.

THIS was an action tried before STREET, J., without a Statement. jury, at London, at the Spring Assizes of 1890.

The plaintiffs were the corporation of the county of Middlesex. The defendants were the sureties of the late registrar of the north and east ridings of the county.

The action was brought upon a bond, dated 8th January, 1886, in the form given in schedule A to the Registry Act, the condition of which was that the registrar should "perform the duties of his office as such registrar, and that neither he nor his deputy shall negligently or wilfully misconduct himself in his said office to the damage of any person or persons whomsoever." Default was alleged in the payment of \$737.50, and interest; being the portion of the fees received by the registrar, which he should have paid over

Statement. to the plaintiffs under the 107th section of the Registry Act, R. S. O. ch. 114.

The form of the bond was that prescribed by the Registry Acts in force before the introduction of the provisions giving to the municipalities a share in the registrar's fees.

The learned Judge delivered judgment dismissing the action, reported in 19 O. R. 349.

A motion was made to the Divisional Court of the Queen's Bench Division to set aside the judgment and to enter judgment for the plaintiffs. And on the case being transferred to this Division the motion was heard.

In Michaelmas Sittings, November 20, 1890, *Purdum* supported the motion.

Osler, Q. C., contra.

January 5, 1891. ROSE, J. :—

I think I should require direct authority in favour of the plaintiff's contention before I should agree to the proposition that the sureties on the bond under sec. 107 of R. S. O. (1887) ch. 114, would be bound for the due payment by the Registrar of a portion of his fees to the municipality under 35 Vict. ch. 27 (O.)

The rule is laid down in practically the same terms in the references given to us by Mr. Purdom, viz., *Brandt on Suretyship*, sec. 469; *Meyer's Federal Decisions*, vol. 4, sec. 427, *Dillon on Municipal Corporations*, 4th ed., p. 299, sec. 216; and it is, to quote from Mr. Brandt that, "As a general rule, the sureties on an official bond are liable for the faithful performance of all duties imposed upon such officer, whether by laws enacted previous or subsequent to the execution of the bond, which properly belonged to and come within the scope of the particular office. They are not, however, liable for after imposed duties, which cannot be presumed to have entered into the contemplation of the parties at the time the bond was executed."

I certainly cannot think that sureties who became bound for the proper discharge of the duties of office by a Registrar when he was to retain for his own use all the moneys coming into his hands, could be presumed to have contemplated that the Registrar might be required to account for or pay over a portion of such moneys and that they would become liable for any misapplication of such moneys. Such duties do not in my judgment properly belong to or come within scope of the duties of the particular office held by the Registrar when the sureties went on his bond.

Judgment.

Rose, J.

For these reasons as well as those upon which my learned brother acted, I think the judgment must be affirmed and the motion dismissed with costs.

GALT, C. J., concurred.

[COMMON PLEAS DIVISION.]

REGINA V. McNAMARA.

Criminal law—Indictment for attempting to prostitute a woman—Evidence of reputation of bawdy house—Admissibility of.

On an indictment for attempting to procure a woman to become a common prostitute, in corroboration of her evidence that for such purposes the prisoner had taken her to a bawdy house, evidence of the general reputation of the house is admissible.

THE prisoner was tried before GALT, C. J., for "that he, the Statement. said Frederick Charles McNamara, unlawfully did attempt to procure her, the said Ellen McIntosh, to become within Canada, to wit, at the city of Toronto, a common prostitute."

After the evidence of the prosecutrix had been given, the inspector of police was called to prove the reputation of the house to which she had been taken by the prisoner. As soon as the witness was asked as to whether he knew the woman to whose house she had been taken, and the house, Mr. Bigelow objected, that under the

Statement. indictment they must prove it to be a house of ill-fame : that it must be proved to be a brothel.

There were three counts in the indictment, one of which was for attempting to procure the prosecutrix to become an inmate of a brothel.

On this objection being made, Mr. Riddle, for the Crown, stated that it was upon the third count (being the one on which the prisoner was convicted) that this evidence was offered.

The learned Chief Justice received the evidence as being evidence in corroboration of her testimony to sustain the charge, viz., that of attempting to procure her to become a common prostitute, "not as proof the house was a brothel," as it appeared to him such general statement was admissible, and reserved a case as to the admissibility of such evidence.

In Michaelmas Sittings, November 29th, 1890, the case was argued before GALT, C. J., ROSE, and MACMAHON, JJ.

Bigelow, Q. C., for the prisoner. Evidence of general reputation alone cannot be given to prove that the house was a house of ill-fame. You must prove that specific acts of adultery were committed in the house; at all events such specific acts must be proved before evidence of reputation can be received : *Rex v. Parker*, 3 Doug. 242, 521.

Dymond, contra. The evidence of general reputation was properly received. The proper course is to prove such reputation. Isolated acts of adultery do not prove the fact of the house being a house of ill-fame: *J Anson v. Stuart*, 1 T. R. 748, 754; *Clarke v. Periam*, 2 Atk. 337, 339; *State v. McDowell*, Dudley's South Carolina Law and Equity Rep. 346; Wharton's Criminal Law, 6th ed., sec. 2393; 9th ed., vol. ii., sec. 1452; Wharton's Criminal Evidence, 8th ed., sec. 261.

January 5, 1891. GALT, C. J. :—

Judgment.

Galt, C.J.

In *J'Anson v. Stuart*, 1 T. R. 748, Buller, J., in his judgment says, at p. 754: "With respect to the case of an indictment for keeping a common bawdy house, there more certainty in the indictment is required than is stated here;" (The case was an action for libel in charging the plaintiff with being a common swindler,) "for it must state the place where the house is situate and the time; the crime therefore is particularly stated in that case, for the offence is the keeping of the house. And it is not necessary to prove who frequents the house for that may be impossible."

The prisoner was not indicted for keeping a brothel. The charge against him was for endeavouring to procure the young woman to become a common prostitute; and it appears to me the character of the house to which she was taken was admissible to sustain the charge.

ROSE, J. :—

The charge upon which the prisoner was tried was attempting to procure Ellen McIntosh to become a common prostitute. This offence of course could be made out without the said Ellen McIntosh entering any bawdy house, but it certainly would be a fact which would have a direct bearing upon the intention of the prisoner, if it appeared that in his course of action he had taken the girl to a bawdy house.

The Crown, therefore, very properly tendered evidence to show that the prisoner had taken the girl to a bawdy house.

When the question arose as to the admissibility of evidence of general reputation to show that the house in question was a bawdy house. Mr. Bigelow, for the prisoner, objected that such evidence was not competent.

The learned Chief Justice over-ruled the objection, and reserved the question in the following words: "Evidence of general reputation was given subject to Mr. Bigelow's

Judgment. objection. This is a question reserved for the consideration
Rose, J. of the Court."

I have had very considerable difficulty in finding any English or Canadian authority upon the question.

In Burn's Justice of the Peace, 30th ed., vol. i., p. 1395, it is said: "If a person be indicted for frequenting a bawdy house, it must appear that he knew it to be such a house; and it must be expressly alleged that it is a bawdy house, and not that it is expected to be so." Wood's Inst. b. 3, ch. 3. But it is not necessary to state particulars in the indictment, as the names of those who frequented the house, &c.: *J'Anson v. Stuart*, 1 T. R. 754; *Rex v. Higginson*, 2 Burr. 1233.

It is further added "to prove that a house is a *bawdy house*, more precise evidence is required than will suffice for a conviction for keeping a *disorderly house*. Evidence of particular instances of illicit intercourse may be given under the general charge: *Clarke v. Periam*, 2 Atk. 339; it is not, however, necessary to prove who frequents the house, for that may be impossible; and if any unknown persons are proved to be there behaving disorderly, it is sufficient to support the indictment:" *J'Anson v. Stuart*, 1 T. R. 754.

And so, in effect, say all the English text writers on the subject.

In Wharton's Criminal Law, 9th ed., vol. 2, sec. 1452, it is said: "As has just been seen, bawdy houses admit of a wider range of proof. Whether it be because the term 'house of ill-fame' is sometimes, by statute, made convertible with bawdy house; or whether it be because at common law a 'house of ill-fame,' as a scandal to the community, is *per se* indictable; or whether because no other proof can often be had; it has been ruled, though on questionable authority, that the 'ill-fame,' or bad reputation may be proved. But however this may be, it is settled that the bad reputation of the persons visiting the house may be put in evidence. It is, in any view, error to charge the jury that they are to convict if the house has a bad reputa-

tion. They must only convict if they believe the house to be one of ill-fame or a bawdy house, as the case may be."

Judgment.

Rose, J.

And in Wharton's Criminal Evidence, 8th ed., sec. 261, it is said: "On indictments, however, for keeping houses of ill-fame, when such is the statutory term describing the offence, the ill-fame or bad reputation of the house may be put in evidence. The bad reputation of the visitors is in any view competent evidence. But of a disorderly house the reputation is inadmissible being secondary evidence of disorder, which is susceptible of immediate proof."

In our statute R. S. C. ch. 157, sec. 8, sub-sec. j, all persons are made subject to summary conviction who "are keepers or inmates of disorderly houses, bawdy houses, or houses of ill-fame, or houses for the resort of prostitutes, &c.

By this section apparently the term "bawdy houses, or houses of ill-fame," describes the same class of house.

We were, however, referred to a decision in the Court of Appeals for the State of South Carolina: Dudley's South Carolina Law and Equity Reps. 346, which deals with this question, and I am prepared to adopt, as my judgment in this case, the argument and conclusion of the learned Judge, Mr. Justice O'Neill, who delivered the opinion of the Court, in which he reviewed the English authorities, to some of which I have referred, and in a judgment, which I may presume to say is full of good common sense, has laid down principles that I think may well be adopted to guide the Court with reference to the reception of evidence as to the character of such houses. The learned Judge said as follows: "To decide upon the only other point in the cause, whether the fact that the defendants were notorious prostitutes, and that the houses occupied by them were kept as common bawdy houses, without proving particular facts, such as men and women meeting together there for purposes of illicit intercourse, was competent evidence, it will be necessary to enquire first, what is the offence? The cases upon the subject, to the honour of the Courts of Law, are few, and none are to be found reported in the South Carolina decisions. Lewdness is not punish-

Judgment. able as a crime *per se*, at law. It must be accompanied by
Rose, J. something else, such as indecent exposure, or keeping a
bawdy house, to make it indictable. In the Crown Cir.
Com. 366, it is truly said : ' Although lewdness be properly
punishable by the ecclesiastical law, yet the offence of
keeping a bawdy house cometh also under the cognizance
of the law temporal, as a common nuisance not only in
respect of its endangering the public peace, by drawing
together dissolute and debauched persons, but also in respect
of its apparent tendency to corrupt the manners of both
sexes.' To the same effect is Bac. Abr. Tit. "nuisance," letter
A. It is the keeping of a bawdy house which is therefore
indictable ; the fact that its inmate is a prostitute is only
one circumstance to fix its character upon it. In *J'Anson*
v. Stuart, Buller, J., said : ' With respect to the case of an
indictment for keeping a common bawdy house ; there more
certainty is required than is stated here ; for it must state
the place where the house is situate and the time ; the crime,
therefore, is particularly stated in that case, for the offence
is the keeping of the house.' This dictum of a great Judge
shows clearly that the offence consists in keeping the house.
How is this fact to be proved, is the second enquiry ? It
is a general rule that the *allegata* and *probata* ought to
correspond. The charge is a general one, and we should
be at liberty hence to conclude that general proof is all
which is required. Indeed I think it is the best proof. I
know you may prove particular facts, and from these
the jury find the general charge. In *Clarke v. Periam*,
2 Atk. 339, Lord Chancellor Hardwicke stated the rule
in this respect, which has been adopted by all the ele-
mentary writers. He said : ' Suppose in the case of an
indictment for keeping a common bawdy house, with-
out charging any particular fact, though the charge
is general, yet at the trial you may give in evidence par-
ticular facts, and the particular time of doing them.' This
maintains no more, than that you may give such evidence,
not that you shall give no other. No case or dictum can
be found excluding the evidence received on the trial of

this case. Its admissibility can be fully shown. The fact that the defendants were prostitutes, can only be proved, (by any evidence which the Court would tolerate), by the unenviable character which their lives have given them. It cannot be denied that this evidence was admissible to arrive at the nature of the house kept by them. For unless you admit this the offence could not be made out by men and women meeting together at the houses. It is only when occupied by prostitutes, and that males go to such places, that the particular facts are made out, spoken of by Lord Hardwicke. So far, then, I take it, there is no objection to the proof. The offence, we have seen, is keeping a bawdy house. The existence of the house within the venue must be proved. This was done in this case. The only thing remaining to be shown was its character. It was that which rendered it criminal. When the facts are proved that the defendants, common prostitutes, occupied particular houses in the town of Columbia, a strong presumption of the character of the houses was raised. When it is shewn that their houses were notorious—that is, known to the whole community as common bawdy houses—it is the same thing as if it was proved that over the door of each house was written in the abominable law word, ‘bawdy’ ‘within.’ Look to the reason why the law punishes the offence. It is because such houses may draw together dissolute and disorderly persons, to the danger of the public peace, and may corrupt the manners of both sexes. Is not a house, notorious as a bawdy house, the very thing to attract dissolute and disorderly persons, and is it not the very thing to corrupt the manners of both sexes? To say that there is any danger of a virtuous woman being convicted on such testimony, is utterly absurd. She cannot even be suspected until she has lost her character, and she cannot be convicted until she occupies a position furnishing flagrant proof. But if such a charge should even be made against a virtuous woman, her character will be her shield: and in her vindication she may examine into the foundation and truth of every par-

Judgment.

Rose, J.

Judgment.

ROSE, J.

ticular on which such a charge may be made. I think, too, a decent regard to good morals should always be had in the requisition and adduction of evidence in a Court of Justice. Every corrupting fact which can be supplied by general proof, should be excluded. The general proof here is just as satisfactory as the most direct proof can be. Why should more be required? The law does not require it, for no such rule of evidence exists. The best evidence which the nature of the case admits of, is an old and familiar rule: that has been complied with here; and we have the proof of the truth of the old saying, that 'what everybody says must be true,' in the admission of the zealous counsel for the defendants, that he had not a doubt of their guilt. And in a case in which character is its very gist, I am willing to make that which everybody says, the evidence on which a jury may, if they choose, convict defendants for keeping a bawdy house."

In my opinion the judgment must be for the Crown.

MACMAHON, J., concurred.

[COMMON PLEAS DIVISION.]

BUSH V. McCORMACK.

New trial—Slander—Finding by jury of no damages ; but no finding as to the slander—Jury.

In an action of slander the jury returned a finding of no damage ; but said they could not agree as to whether their verdict should be for the plaintiff or defendant ; upon which the trial judge directed judgment to be entered for the defendant, dismissing the action :—

Held, that the finding of no damage did not dispose of the action, but that there should have been a finding on the charge of guilt ; and a new trial was directed.

Wills v. Carman, 14 A. R. 656, considered.

This was an action of slander tried before FALCONBRIDGE, ~~Statement.~~ J., and a jury, at Barrie, at the Autumn Assizes of 1890.

After the jury had retired they returned into Court, and, as stated by the learned Judge : “The jury find a verdict of no damages. On being asked by me they say they cannot agree as to whether their verdict should be for plaintiff or defendant.”

Upon which the learned judge directed judgment to be entered dismissing the action without costs.

A motion was made on behalf of the plaintiff to set aside the judgment and for a new trial

In Michaelmas Sittings, December 5, 1890, *Lennox* supported the motion.

Aylesworth, Q. C., contra.

January 5, 1891. GALT, C. J.:—

It is plain from the reply made by the jury that they were unable to arrive at a conclusion ; in other words, “they disagreed.”

Under these circumstances there must be a new trial. The cases cited by Mr. Aylesworth referred to applications for a new trial on the question of damages ; but in the

Judgment. present the jury stated "they could not agree as to whether
Galt, C.J. their verdict should be for plaintiff or defendant."

The motion must be absolute ; costs to be costs in the cause to the successful party.

ROSE, J. :—

The entry on the record by my brother Falconbridge shews that some of the jury thought that the defendant was guilty, and others that he was not guilty ; or that some, if not all, were undecided as to whether he was or was not guilty. There was therefore a disagreement or a failure to arrive at a finding on the main question which the parties came down to try. But our learned brother, being evidently of the opinion that a finding of no damages was a finding for the defendant, entered judgment for the defendant dismissing the action, but without costs.

We are therefore brought to consider the question, which was not in terms decided in *Wills v. Carman*, 14 A. R. 656. What was there decided was that a finding that the defendant was guilty of libelling the plaintiff, coupled with a finding that the plaintiff had sustained no damage, did not entitle the plaintiff to judgment.

The learned Chief Justice of Ontario, in appeal, treated the action of the jury as a positive refusal to assess ; and held that the verdict was void, being of the opinion that the question of damages, either nominal or substantial, was for the jury, and that the Court could not on such a finding enter judgment for the plaintiff for nominal damages. The learned Chief Justice of this Division, who sat in appeal to hear that case, concurred in the judgment of the Chief Justice of Ontario. Mr. Justice Osler was of the opinion that the verdict was a void verdict, not warranting a judgment for either party, or at least was not prepared to hold to the contrary (p. 682). Mr. Justice Patterson thought the result to be a finding in favour of the plaintiff, entitling him to judgment for nominal damages. All concurred in holding that on such a finding judgment could not be entered for the defendant.

That, it seems to me, was a holding that the plaintiff was entitled to have the jury pass upon two questions: (1) The guilt or innocence of the defendant. (2) The damages. Judgment.
Roe, J.

If the jury find the defendant guilty, then the defendant would be entitled to have the jury assess the damages, either at a nominal or substantial sum; and if the jury refuse to assess any damages, then the holding of the majority was that the finding would amount to a void verdict entitling neither party to judgment.

Perhaps it is fairer to say that such a holding was by the two learned Chief Justices, because my brother Osler by his judgment leaves open for consideration the question of whether with a finding for the plaintiff on the issues of fact other than the damages, the plaintiff may not have judgment without any assessment of damages.

In my opinion the jury should not consider the question of damages until they have decided the question of the defendant's guilt or innocence. It is clear, however, that the refusal of the jury to assess damages or the finding of no damages does not dispose of the action. It is necessary that there should be a finding on the question of the charge of guilt.

I therefore agree that there should be a new trial with costs, as stated by the learned Chief Justice.

[COMMON PLEAS DIVISION.]

CUDNEY V. GIVES.

Specific performance—Exchange—Time of the essence—Date of performance on Sunday.

In an action for specific performance, even when time is of the essence of the agreement, if the party in default has done what in him lay to perform the contract, the Court may, in the exercise of its discretion, grant the relief claimed.

And where, by such an agreement, the conveyance was to be tendered by the plaintiff to the defendant and the transaction closed on the "first day of June" which fell on Sunday, when no tender was made, and the conduct of the defendant on the following day was such as to exclude a tender on that day, in an action for specific performance the plaintiff was held entitled to judgment.

Statement.

THIS was an action for specific performance of a contract for an exchange of lands, tried before ROSE, J., without a jury, at Berlin, at the Autumn Assizes of 1890.

The defendant's obligation was as follows: "The said lots to be conveyed to the said Cudney on the first day of June, A.D. 1890, on receipt of a conveyance from the said Cudney and wife of the lands hereinafter mentioned."

It was further stipulated "that time is to be considered the essence of this agreement, and unless the terms hereof are punctually made at the time and in the manner above mentioned, these presents shall be null and void and of no effect."

The first of June fell on Sunday. Prior to that day the defendant expressed his unwillingness to perform his contract; and, in answer to a subsequent inquiry of William Cudney, the plaintiff's husband, acting for her, as to what he intended to do, said in effect that the plaintiff must wait until the 1st of June to ascertain.

On the 2nd of June, Monday, the plaintiff's husband waited on the defendant and told him that the deeds of the plaintiff's property were then drawn up and at her solicitor's office, and requested the defendant to attend and close the transaction. The defendant referred William Cudney to the defendant's solicitor, but as the solicitor was out of town, it was impossible to communicate with

him at his office until the 4th, when he at once informed ^{Statement.} William Cudney that the defendant would not perform the contract.

The defence was, that the contract became void because there was no tender on Sunday or Monday of a conveyance by the plaintiff to the defendant.

King, Q. C., for the plaintiff.

Lash, Q. C., and *Milligan*, for the defendant.

November 1, 1890. ROSE, J.:—

I find as a fact that a tender on Monday would have been useless: that such tender would have been a mere form, as the defendant would on that day have refused to perform his agreement. A tender on that day was therefore unnecessary. See *McSweeney v. Kay*, 15 Gr. 432, at pp. 437, *et seq.*, citing *Hunter v. Daniel*, 4 Hare 420.

A subsequent tender was made, and the deed as tendered was objected to at the trial, as in terms rendering the defendant liable for more interest than he was under contract to pay.

There was also an objection to the description. No objection was made on these grounds at the time, and I do not now consider them as I have found that the plaintiff was excused by what took place on the 2nd, from making any tender.

It remains to be considered whether the plaintiff should have made a tender on Sunday. There would have been nothing illegal at common law in his doing so, nor does the statute cover such a case, but, if he required the assistance of his solicitor to close the transaction he probably would not have been able to command his services, and certainly neither the registry nor any other public office would have been open.

I think what was contemplated by the agreement was not merely an exchange of deeds, but a closing of the transaction including the usual searches, and this clearly could not have been done on a Sunday.

Judgment.

Rose, J.

It is clear that the defendant could not have been required to attend to the matter on Saturday, for, in addition to the contract stipulating that the transfer should be on the 1st of June, the defendant, as I have stated, refused to do anything prior to such day. May not the "first day of June" well mean the "first juridical day of June." If so, there can be no doubt that Monday would have been such day.

I have come to the conclusion that the plaintiff was not bound to tender on the Sunday, and that what took place on the Monday excused her from tendering on that day.

There is a singular dearth of authority on the question. I have found only one case in our own reports, viz. *Whittier v. McLennan*, 13 U. C. R. 638. There the contract was that the deed should "be delivered on or before the 1st day of April, 1855." This day was Sunday.

Robinson, C. J., said, at p. 640, "I am inclined to think that the plaintiff in this case should have come on the Saturday, if the money could not have been tendered on the Sunday, but am not confident that the law is so settled." Again, "I am aware that in a case of this kind, where the day of performance falls upon a Sunday, the question has been considered a doubtful one, whether the party who should make the payment is in time on the Monday, or whether he should pay on the Saturday."

The distinction between the contract in that case and the one in question, prevents this expression of opinion giving the defendant any assistance.

In Bouvier's Law Dictionary, 15th ed., vol. 2, p. 685, under "Sunday," it is said, "but if the last day happen to be a Sunday, it is to be excluded, and the act must, in general, be performed on Monday," citing 3 Penn. R. 201; 3 Chitty Pr. 110. I am not sure what the latter reference is, but I find in Chitty's Commercial Law, vol. 3, a discussion of Sunday laws, at pp. 105, 426, and 583, to the last of which I may refer as interesting.

At p. 583, it is said: "The holder of a bill of exchange is also excused for not giving notice of its dishonour in the

usual time, by the day on which he should regularly have given notice being a public festival, on which he is strictly forbidden by his religion to attend to any secular affairs;" citing *Lindo v. Unsworth*, 2 Camp. 602. There the plaintiff was a Jew, and it was unlawful according to his religious belief to attend to any sort of business during a certain Jewish festival.

Judgment.

Rose, J.

Lord Ellenborough, said, at p. 603: "I think the plaintiff was excused from giving notice on the 8th, upon the score of his religion. The law required him to give notice, with reasonable diligence, and I think he did so if he sent off the letter as soon as he could after the termination of the festival, during which he was absolutely forbidden to attend to secular affairs. The law merchant respects the religion of different people. For this reason, we are not obliged to give notice of the dishonour of a bill on our Sunday."

The editor adds a foot note, as follows: "Stat. 39 & 40 Geo. III. ch. 42, 'for the better observance of Good Friday,' enacts, that with respect to bills of exchange and promissory notes, *Good Friday* shall be considered like a Sunday or Christmas-day; but this seems to have been so at common law and by the custom of merchants. Vide *Tassel v. Lewis*, 1 Ld. Raym. 743."

In Wharton's Law of Contracts, vol. 2, sec. 897, it is said: "When the time for the performance of a contract falls on Sunday, the performance may be tendered on the next Monday," referring to a number of American cases.

But I do not think it necessary to enquire further what the law may be, or to determine whether at law it was sufficient to tender on the Monday, because, as it seems to me, in cases such as the present the Court has a discretion to grant specific performance after the day named.

The case of *McSweeney v. Kay*, to which I have referred, and which was cited by Mr. King on this point, shews that the late learned Chancellor Spragge so understood and stated the law. I do not cite at large from the judgment, which should be read as a whole, but refer particularly to

Judgment.

Rose, J.

p. 439, where the learned Chancellor said that the Court will admit a party "to shew a good and valid reason for its non-performance at the time; as for instance that he did all that in him lay, in order to its performance." Again, at p. 441: "The law of this Court, to which I have adverted, when time is made of the essence of the contract, would not be founded on equity or good sense, if it were so rigid as to exclude from relief a party who in good faith and with diligence has striven to perform his part of the contract."

I adopt the above language as entirely applicable to the present case. I think the plaintiff did what in her lay to complete the contract, and that the reference by the defendant to his solicitor on the Monday, and the refusal by the solicitor on the Wednesday, put the plaintiff in the same position as if the refusal had been in terms, as I believe it to have been in fact, made on the Monday; and so, in my opinion, the plaintiff was excused from making a useless tender as nothing subsequently done caused such duty to spring into existence.

Mr. Lash candidly admitted that his client was forced to rely on his strict legal rights to get rid of performing his contract, having no equity to urge. The plaintiff has acted fairly and reasonably and should be assisted as fully as consistent with the established rules.

The plaintiff is entitled to a decree, but by consent of parties I order payment of \$200, the sum fixed by the contract as liquidated damages, instead of ordering specific performance.

The plaintiff will have her costs.

[COMMON PLEAS DIVISION.]

TOTTEN ET AL. V. TOTTEN ET AL.

Will—Property for payment of debts—Legacy—Children taking share of deceased parent.

A testator by his will, after directing payments of his debts by his executors, gave his personal estate and the dwelling-house with the land occupied therewith, to his wife for life, and after her decease to his daughter M., and gave M. a legacy of \$2,000. He then devised the residue of his real estate to his executors in trust, to lease same and pay the interest to his wife for life, and after her death, to sell same and divide the proceeds between his children, share and share alike. At the time of testator's death, the personal estate was of small value, and was exceeded by the amount of the debts; and it did not appear whether, when the will was made, the testator had sufficient personal estate of which the legacy could be paid :—

Held, that M. could not claim to have the \$2,000 paid out of the proceeds of the real estate devised to the executors, but that there should be no deduction from her share by reason of the real estate devised to her :—

Held, also that the children of a deceased child took the share of the proceeds of the real estate which their parent was entitled to.

THIS was a motion on behalf of the plaintiffs, executors Statement under the will of the late James Totten, deceased, for judgment on the pleadings.

The action was brought that a declaration might be made as to the proper construction of the will.

Middleton, in support of the motion.

Fullerton, Q. C., for Mrs. Franks, one of the defendants.

E. W. Boyd, for the other children.

J. Hoskin, Q. C., for the infant grandchildren.

December 10, 1890. GALT, C. J. :—

The will was made on 13th September, 1883. The testator died on 10th September, 1884; and his widow died in 1890. One of his children Sarah Sproul was living at the date of the will, but died before the death of the testator, leaving the two infant defendants.

By his will the testator, after directing that all his debts should be paid by his executors, directed, (so far as this

Judgment. case is concerned) that his wife should have a life interest
Galt, C.J. in his personal estate, with remainder to his daughter Margaret Totten, now Mrs. Franks. He then devised to his wife for her life the dwelling-house in which they lived, and a certain parcel of land of about five acres occupied therewith; and after her death to his daughter, Margaret, now Mrs. Franks, her heirs and assigns for ever. He then devised to his said daughter a legacy of \$2,000.

The will then proceeds as follows :

"All the rest and residue of my real estate, not heretofore bequeathed to my wife for her natural life, and to my daughter Margaret Totten in fee after the death of her mother, and being part of lot 9 in 6th concession of Vaughan, I give, devise, limit, and appoint unto William Totten, William Watson, and John Harper, to hold the same upon trust," (to lease the same and pay the rent to his wife.) "Secondly, I direct my said trustees, or the survivors of them, as soon as conveniently may be after the death of my said wife, to sell and absolutely dispose of said lot number 9 hereby mentioned, hereby giving my said trustees, or the survivor of them, full power and authority to sell the said land. The proceeds of the sale of my said lands, I direct my said trustees or trustee to divide equally between all my children, share and share alike, as soon after the sale of the said lands as possible."

At the time of his death (as appears by the affidavit of William Totten, one of the executors), the personal estate of the testator was of the value of \$90 or thereabouts, and that he was indebted to various creditors to about the sum of \$500.

The first question is as to the right of Mrs. Franks to the legacy of \$2,000. She claims she is entitled to this in addition to her share of the proceeds of the sale of the real estate.

It is not shewn whether at the time the will was made, the testator had any personal estate out of which this legacy could be paid. If he had not, then there is no fund out of which it can be now discharged. The dwelling-house and five acres were expressly devised to her after the death of her mother. The executors had no control over that property; and as to the residue of the lot, it was vested in the executors, with express directions to sell the

same and divide the proceeds among his children, share and share alike.

Judgment.

Galt, C.J.

In my judgment this claim on behalf of Mrs. Franks cannot be allowed.

The second question is as to the right of the infant defendants to their mother's share of the estate.

By sec. 36, ch. 109, R. S. O.: Where any person being a child of the testator to whom any real or personal estate is devised or bequeathed, dies in the life time of the testator leaving issue, and any of the issue of such person are living at the time of the death of the testator, such devise shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator.

At the time the will was made, his daughter Sarah Sproul was living, and (although it is not stated in the case) her children Frederick B. Sproul and Ada Mary Sproul, the defendants, must then have been born, for the testator died in less than a year after the will was executed, and in the meantime their mother had departed this life.

Under the provisions of the statute, there can be no doubt that had the bequest been to the children by this marriage, the infant defendants would have been entitled; but as it was to "all my children, share and share alike," it is contended that it was to a "class," and that the persons constituting that class, must be ascertained at the time of the death of the testator, and, therefore, the children of the deceased Mrs. Sproul were not within the provisions.

In my opinion the testator beyond question intended that each of his children should take an equal share.

The case of *Habergham v. Ridehalgh*, L. R. 9 Eq. 395, is so much in point as respects this question, and the observations of Vice-Chancellor James, at p. 400, are so appropriate, I quote them at length: "It was contended by Mr. Kay that a gift to A. and a class of persons, is also a gift to a class, and that with regard to that class this rule has been

Judgment. laid down : that in order to determine the class you must
Galt, C.J. take the persons who answer the description at the death of the testator. This implies that where there is a gift to a class, that means a gift to such of the class as shall be living at the death of the testator ; and it follows that no one member of the class who may have died in the life time of the testator, will be entitled. This reasoning is a very good illustration of the process by which in this Court we have established a body of dogma, and developed a whole code of artificial rules according to which a testator's will is treated as if it were something written in cypher, and incapable of being construed except by those learned persons who have the key of the cypher. Nevertheless sometimes the Court is enabled to determine questions arising upon wills according to the rules of common sense ; either by playing off one rule against another, or by resorting to some general rule of construction which controls the rest. One of these rules is, that no one is to be deprived of a remainder by reason of the death of the tenant for life before the occurrence of the event upon which the remainder is to take effect. Another rule is, that the general intent is to prevail against the particular intent ; and if the Court can arrive at a general result as to what the testator intended, that general result will prevail over every particular construction. In this case I must come to the conclusion that the children of Henry Mitchell were objects of the testator's bounty ; and it would be a departure from that intention to deprive them of that bounty. It seems to me, also, that the other children of the testator's brothers and sisters, were also intended to be objects of his bounty ; and it would be a violation of his plain general intention to deprive them of that bounty by reason of the death of their parent in his life time."

As I have already stated, I entertain no doubt it was the intention of the testator that the children of any of his children dying in his life time, shall be in the place of their deceased parent. In my judgment, therefore, the defendants, Frederick B. Sproul and Ada Mary Sproul, are entitled to the share of their mother Sarah Sproul.

Then as to the disposition of the purchase money of the land devised to the executors in trust to sell.

Judgment.

Galt, C.J.

It appears from the affidavit of one of the executors that there was little or no personal estate, and there was personal liability of the testator.

On the argument it was contended on behalf of Mrs. Franks that this liability should be discharged out of the proceeds of the sale; the other children assert there should be a proportionate amount payable by Mrs. Franks, regard being had to the value of the real estate specifically devised to her.

By the will (the same as in the case to which I am about to refer), the testator "directs that all his just debts, funeral and testamentary expenses, shall be paid and satisfied by his executors as soon after his decease as conveniently may be."

He then disposes of his real and personal estate as follows:

"His personal estate to his wife for life, and after her death to Mrs. Franks." Then as to his real estate. The dwelling-house and five acres to his wife for life, and after her death to his daughter Mrs. Franks. There is no reference here to his executors; they took nothing as respects this real property under the terms of the will. He then devises the rest of his real estate to his executors in trust to sell the same after the death of his widow, and divide the proceeds of the sale equally among his children.

The case of *Re Bailey*, 12 Ch. D. 268, appears to me to be decisive in favour of the contention of Mrs. Franks, viz., that the debts which the executors are directed to pay, shall be paid out of the land devised to them.

Mr. Justice Fry, in his judgment, states: "I do not think there is any conflict in the authorities. They appear to me to come to this—that where there is a direction that the executors shall pay the testator's debts, followed by a gift of all his real estate to them, either beneficially or on trust, all the debts will be payable out of all the estate so given to them."

Judgment.

My judgment therefore is :

Galt, C.J.

1. That the defendant, Mrs. Franks, is not entitled to claim the legacy of \$2,000 out of the proceeds of the sale of the lands devised to the executors.

2. That the infant defendants, Frederick B. Sproul and Ada Mary Sproul, are entitled to the share of their late mother Sarah Sproul.

3. That the first charge on the proceeds of the sale by the executors, is the amount of the personal liabilities of the testator at the time of his death, and that before any distribution is made, such amount shall be paid.

4. That there shall be no deduction from the share of Mrs. Franks on account of the real estate devised to her.

That the costs of all parties to this action be paid out of the estate.

[COMMON PLEAS DIVISION.]

BALDWIN V. WALSH.

Arbitration and award—Motion to set aside—Lapse of time—52 Vict. ch. 13 (O.), secs. 2, 3, 4, 6.

A motion to set aside an award under a reference by consent was made within fourteen days of the filing, but more than four months after the making thereof :—

Held, too late.

THIS was a motion on behalf of the defendant to set aside an award made by two of the three arbitrators under a reference by consent of the parties under seal.

The award was dated the 20th June 1890, and was published a few days thereafter.

The notice of motion to set aside the award was dated the 19th November, 1890, the award having been filed within fourteen days of that date.

Percy Galt, for the motion.

J. T. Small, contra.

December 3, 1890. MACMAHON, J. :—

In *Pardee v. Lloyd*, 5 A. R. 1 where the submission was within 9 & 10 Wm. III., the plaintiff moved on the 2nd of December, 1878 to set aside an award made on the 13th of August previously, accounting for his delay on the ground that the defendant had on the 4th of September, before the end of the next Term, served a notice on him of his intention to appeal. It was not, however, sworn that he refrained from moving owing to the notice. It was held that the evidence did not shew that the delay was induced by the defendant; and that, even if it had, it would have been no excuse for the delay, and the motion was refused.

Moss, C. J. A. in his judgment dealing with the subject of delay in moving against an award where the submission has been a voluntary one, at p. 10, says: "It cannot be

Judgment. doubted that (*prima facie* at least) the party aggrieved
MacMahon, was therefore bound to move against the award before the
J. last day of the term following publication. The statute in relaxing the rule of the common law, which precluded enquiry into the conduct of the judges to whom a person had voluntarily intrusted the determination of his rights, had annexed as a condition of this indulgence that the complaint should be made within a specified time. While it was not unnatural for the Courts to manifest an anxiety to extend this period, where the delay had arisen from causes for which the party was not responsible, and where the refusal to entertain the motion shut the door upon justice, it seems to me to be impossible to state any sound juridical principle upon which such a jurisdiction could be assumed. If advantage was not taken of the salutary provision of the statute within the prescribed period, the rigid rule of the common law remained in full vigor. Where from any cause short of the fraudulent contrivance of the other party, no complaint had been made within the limited time, the right to maintain the award in spite of objections which could only have been taken by the aid of the statute would appear to me to be absolutely vested."

In *Kean v. Edwards*, 12 P. R. 625, (decided in 1888) it was held that an award must be moved against within the term following the publication or within the period which such term formerly occupied.

By the Act amending the Revised Statute respecting Arbitrations and Awards, 52 Vic. ch. 13 (O.), provision is made by sections 2 and 3, "at any time after making of the award" for filing the same together with the agreement or submission with the clerk or registrar of any Division of the High Court, and such filing shall have the same effect as the making of the agreement or submission to arbitration a rule of Court.

And by section 4 a motion to set aside an award so filed, shall not be made after the expiration of fourteen days from the filing thereof, and the giving of notice of filing to

the parties to such agreement or submission, unless under special circumstances the Court or Judge shall allow an appeal after the fourteen days. Judgment.
MacMahon
J.

By section 6 it is provided that "An application to set aside an award to which section 4 does not apply *shall not be made* after the expiration of three months from the making and publication thereof." That is, where the award or certificate has not been filed, and a motion to set aside the award has not been made within the fourteen days of the filing, and three months have expired since the making and publication of the award an application to set aside cannot be made.

The defendant within the fourteen days of the time of making his motion to set aside, but more than four months after the making and publication of the award, filed the award and the agreement to arbitrate, and he now seeks to invoke the aid of the provisions of the above section 4 to enable him to set aside the award.

This I think cannot be done. The sections in the amending Act are somewhat involved, but I consider that by the amendments made the extreme limit now allowed in which to move is fourteen days after filing the award, unless under special circumstances the Court or Judge shall allow an appeal after the fourteen days, providing the filing has taken place within three months of the making and publication. If three months have elapsed from the making and publication the right to move is absolutely gone.

The motion must be dismissed with costs.

[COMMON PLEAS DIVISION.]

REGINA V. RICHARDSON.

Intoxicating liquors—Taverns and shops—Having liquor for sale in defendant's house, being a house of public entertainment—Conviction not following minute—Sale without license—Druggist—Bias.

The defendant had been a licensed hotel keeper, his hotel having a bar furnished with a counter and the usual appliances for the sale of liquor, his license having expired. On being asked by a couple of persons for whiskey, said he could not sell it, and gave them temperance drinks, and on being paid therefor, treated to whiskey, which he obtained from a bottle behind the counter.

The defendant was convicted under section 50, for permitting spirituous liquors to be drunk in his house, being a house of public entertainment, the minute of conviction providing for distress in default of payment of the fine and costs imposed; but the conviction drawn up and returned under a writ of *certiorari* omitted the provision for distress. Neither under sections 50 or 70 is distress authorized:—

Held, that the conviction was valid as being in accordance with section 50; and that, under the circumstances, it need not follow the minute.

Regina v. Hartley, ante p. 481, followed.

Held, also, that the conviction would have been good under section 70, as the giving and being paid for the temperance drinks was a mere subterfuge for disposing and selling spirituous liquors; and further, the conviction could be supported under section 105.

Held, also, that the fact of one of the convicting magistrates being a chemist and druggist, and in such capacity filling medical prescriptions containing small quantities of spirituous liquors, did not incapacitate him from acting as a magistrate and adjudicating upon the case.

Statement.

AN information was laid by the license inspector for the county of Dundas, against the defendant Lot Richardson, for having at the township of Mountain, in said county, on the 27th of June, 1889, unlawfully sold intoxicating liquor without a license.

On the 15th of August Wm. Bow and John McArthur, the two justices before whom the complaint was heard, made an adjudication against the defendant in the following words:

"Defendant is guilty of indirectly selling or giving away intoxicating liquor on the sale of other goods, on the 28th day of June, A. D. 1889, at his house, being a public eating and boarding house, or house of entertainment, contrary to the provisions of section 50 of the Liquor License Act of Ontario; and that he is therefore for his said offence fined fifty dollars and costs in ten days; and in case of want of sufficient distress, that he be confined in gaol two calendar months."

The formal conviction drawn up against the defendant ^{Statement.} and returned, was for that the defendant on the 28th of June, 1889, at his house, in the township of Mountain,—

“ Being a house of public entertainment, did unlawfully permit spirituous liquor to be consumed in the said house by persons other than the members of his family or employees or guests, not being customers, contrary to the provisions of section 50 of the Liquor License Act of Ontario.
* * And we adjudge the said Lot Richardson for his said offence to forfeit and pay the sum of \$50, * * and also to pay to the said Asa Beach the sum of \$28.40 for his costs in this behalf.”

And in default of payment by the 25th of August he was ordered to be imprisoned for one month.

One of the convicting justices was a druggist and as such sold spirituous liquors in prescriptions.

November 22, 1890, *Aylesworth*, Q. C., in Michaelmas Sittings, 1890, moved absolute an order *nisi*, obtained during the same sittings, to quash the conviction upon several grounds.

Langton, Q. C., contra.

January 5, 1891, MACMAHON, J.:—

The defendant was by the adjudication found guilty of indirectly selling intoxicating liquor without a license, the judgment purporting to be under section 50 of the Liquor License Act, R. S. O. ch. 194; but the offence stated to have been committed is really one under section 70 of the Act, for which the statute provides a penalty of not less than \$50, besides costs, and in default of payment imprisonment for not less than three months.

The conviction returned with the writ of *certiorari* is for an infraction of section 50, the penalty for which is by section 85, as amended by 52 Vict. ch. 41, sec. 7 (O.), not less than \$20, besides costs, and not more than \$50, besides costs, and in default of payment one month's imprisonment.

The defendant had an hotel license for his premises in Mountain from May, 1888 to May, 1889, but did not obtain a license for 1889-90; and the evidence of David

Judgment. Gray and Daniel McKercher, two of the witnesses for the prosecution, is that they were at Richardson's place on the 28th of June, 1889: that there was a counter and bar with the usual appliances of bottles, tumblers, etc., and these parties asked for rye whiskey, but Richardson said he could not sell rye, but gave them a temperance drink, which he said he made himself, and, after being paid therefor, treated to rye whiskey, which he took from a bottle behind the counter. This mode of getting intoxicating liquor was twice repeated on that occasion within fifteen minutes. The same parties asked for ale, and Richardson said he had a barrel in the cellar, but it was not tapped.

**MacMahon,
J.**

The evidence clearly establishes that the defendant was keeping a "house of public entertainment," that is, where people called to be refreshed, and where temperance drinks were for sale, and the necessary provision was made for their disposal when called for.

Richardson might have been convicted either under the 70th or 50th section of the Act. His telling customers that he had no license to sell liquor, but could sell temperance drinks, and then treating to rye, was merely a method of disposing of and being paid for liquor which the persons ordered and desired to get, and were prepared to pay for; and without the assurance of getting the liquor the temperance beverages would not have been purchased. The action of the defendant was a mere subterfuge by which he supposed the law might be evaded.

The defendant might also have been convicted under section 50 for permitting liquor, "whether sold by him or not, to be consumed on the premises," being a house of public entertainment, "to persons other than members of his family or employees, or guests not being customers."

In *Regina v. Hartley*, in which judgment was given during last term, (*ante* p. 481) the question of the validity of a formal conviction not in accordance with the adjudication was fully considered; and, on the authority of *Jones v. Williams*, 36 L.T.N.S. 559, it was held, that until the formal

conviction was drawn up there remained to the magistrates a *locus pœnitentiæ* in which they might change their minute. See also *Regina v. Smith*, 46 U. C. R. p. 442; *Regina v. Bennett*, 3 O. R. 45, referred to in *Regina v. Hartley*, ante p. 481.

Judgment
MacMahon,
J.

In *Regina v. Hartley*, the minute of conviction drawn up contained a provision for distress, which the magistrates had no power to insert; and it was held that it did not prevent a formal conviction being drawn up omitting the provision as to distress.

In that judgment *Regina v. Brady*, 12 O. R. 358, 363, and *Regina v. Higgins*, 18 O. R. 148, are considered; and, so far as they are in conflict with the judgment then being delivered, the Court was of opinion they should not be followed.

Under section 105 of Liquor License Act no conviction is to be held insufficient or invalid by reason of any defect of form or substance, provided it can be understood from such conviction that the same was made for an offence against some provision of the Act within the jurisdiction of the justices who made the same, and provided there is evidence to prove such offence, and no greater penalty or punishment is imposed than is authorized by the Act.

In *Regina v. Clark* (not reported), in which the defendant was convicted under section 70 for selling liquor without a license, I pointed out that it is only in cases of first convictions under that section that the justices are allowed to inflict, or the defendant is permitted to escape imprisonment by the payment of a money penalty; for a second or any subsequent offence the only penalty is that of imprisonment. And I held it to be clear under that section that the magistrates could not have legally ordered distress. So by section 85 under which the adjudication of punishment was made for the offence in the present conviction, it is only for first and second convictions that the magistrates can inflict pecuniary penalties; and it is therefore only in such cases that a defendant is allowed to escape imprisonment by payment of a fine. For a third and all

Judgment. subsequent offences against section 50 the only penalty is the imprisonment of the offender.
MacMahon, J.

Had the conviction directed distress, and in default of distress imprisonment, it would have been in excess of the jurisdiction of the justices. See *Regina v. Lynch*, 12 O. R. 372.

There is nothing in the objection that Wm. Bow, one of the convicting justices being a chemist and druggist and in that capacity a vendor of spirituous liquors, was incapacitated from acting as a justice of the peace at the hearing of and adjudication of the case. The mere fact of his being a druggist and in that capacity filling medical prescriptions containing small quantities of liquor, would not constitute such an interest in the prosecution as would prevent him from acting as a justice.

Where an association is formed for the purpose of enforcing an Act, as in *Regina v. Allan*, 4 B. & S. 915, or as in *Regina v. Sproule*, 14 O. R. 375, the members of the association have an interest in the prosecution that disqualifies any member thereof from sitting as a magistrate at the hearing of a charge. So where it is shown that a justice has "such a substantial interest in the result of the prosecution as to make it likely he had a real bias," he is disqualified from acting: *Regina v. Dunning*, 14 O. R. 52.

The prosecution in this case was at the instance of the license inspector, and the affidavit of Mr. Bow, filed in reply on the motion, shows that on the prosecution of Richardson on another charge for an infraction of the Liquor License Act he sat as one of the justices, and, not considering there was sufficient evidence to convict, the case was dismissed. And that no suggestion was made during the proceedings in the present case that in consequence of his being a druggist he was not a proper person to sit as a justice in the matter.

We must, I think, assume that the costs were duly verified by the inspector as required by the Act. It is not said it should be in writing, and if not, it would form no part

of the return to the *certiorari*, although the statement shewing how the costs are made up is returned. Judgment.

The conviction must be affirmed, and the motion dismissed with costs. MacMahon,
J.

[COMMON PLEAS DIVISION.]

COCKBURN V. QUINN.

Landlord and tenant—Lease of premises as dwelling and “gents’ furnishing store”—Right to have auction sales—Injunction.

By a lease under seal the defendant rented from the plaintiff certain premises for three months. The lease contained a covenant that the lessee was not to use the premises for any purpose but that of a private dwelling and “gents’ furnishing store”:

Held, that the carrying on by the lessee of auction sales of his stock, on the premises, was a breach of the covenant restrainable by injunction.

THIS was a motion for an injunction to restrain the defendant from carrying on sales by public auction on premises on Queen street, in Toronto, leased by him from the plaintiff. The facts are stated in the judgment. Statement.

November 28, 1890. *W. M. Clark*, Q. C., for the plaintiff.
George Kerr, for the defendant.

December, 4, 1890. MACMAHON, J. :—

The lease, which is under seal, is a demise by the plaintiff to the defendant of the premises No. 392, on the north side of Queen street, Toronto, for a period of three months from the 1st June, 1890, at a rental of \$45 per month, with a right to either party to determine the lease on giving one month’s notice in writing after the expiration of two months, from the 1st June. After the 1st of September the defendant remained in possession as a monthly tenant, giving notice in November of his intention to vacate the premises on the 1st of January following.

Judgment.
MacMahon,
J.

The lease contains a covenant on the part of the defendant, "Not to use the same (the premises) for any purpose but that of a private dwelling and gents' furnishing store, and to use and occupy the premises continuously during the whole of said term for that purpose only."

Since early in November, the defendant has been conducting nightly auctions sales of his stock of "gents' furnishings," which are alleged to be a great detriment and harm to the premises, and a violation by the defendant of the above covenant on his part as to the occupation of the premises.

- 4 During the argument I thought that so long as the defendant carried on on the premises the business stipulated to be carried on by the terms of the lease, the sales in connection with such business, might possibly be effected through the medium of public auctions without a violation of the covenant. I must, however, consider what was the contract between the parties and see if in reference to that contract there has been a violation for which the defendant should be enjoined.

Counsel for the defendant, referred to *Keith v. Reid*, L. R. 2 Sc. App. 39, the head note of which is; "In a retail shop sales by auction are allowable, unless prohibited by the agreement between the landlord and tenant."

On a reference to that case, in volume 6, 3rd series, Court of Sessions cases, at p. 768, it is said: "The lease contained no condition as to the nature of the business to be carried on in the premises."

This case is quite distinguishable from that, as there is a covenant to occupy for a certain purpose—namely, as a dwelling and "gents' furnishing store."

In *Reeves v. Cattell*, 24 W. R. 485, where the lease contained a covenant to use the house as a private house only, it was held the covenant was not broken by an auction sale on the premises of the furniture belonging to the house. Jessel, M. R., in refusing the injunction in that case, said: "I do not think that the proposed sale will be a breach of the covenant. It would be a different thing if

furniture was brought to the house for the purpose of being sold there."

Judgment.
MacMahon,
J.

The parties must, I assume, have been taken to contract in reference to the ordinary business of what is called a "gents' furnishing store," and to the usual manner in which such business is carried on, that is, by sales over the counter. Had it been shewn by the affidavits that in connection with the conduct of such business it was the custom to have even occasional auction sales, the plaintiff could have no cause of complaint, as it would be taken that the parties contracted in reference to such custom. There is no such evidence furnished by the defendant.

The plaintiff offered to lease to the defendant the premises for three months, from 1st January, agreeing to allow the auction sales to be carried on on the premises up to the 1st January, and the plaintiff had executed a lease providing for such sales, and had tendered the same to the defendant for execution, but the defendant not requiring the use of the premises after the 1st of January, refused to execute the lease.

This, it was urged by the defendant, showed that the plaintiff did not regard the holding of auctions as being a detriment to the premises; and that the injunction motion was being pressed to force the defendant to accept the tenancy for the further period of three months.

The plaintiff's reply is, that the shop mentioned is covered by posters announcing nightly sales, and his desire was that the premises should be occupied for three months after these sales had been discontinued for the usual and ordinary business of a "gents' furnishing store;" and in that event he would not object to the auction sales continuing until the 1st of January.

The action of the plaintiff in being willing to thus treat, will no doubt be considered in dealing with the question of damages at the trial, but it does not deprive him of his right to have the defendant enjoined from continuing the auction sales, if in so doing the covenant in the lease is being violated.

The injunction must be granted until the hearing. The costs thereof to be costs in the cause.

[CHANCERY DIVISION.]

BARBER V. CLARK.

*Mistake—Money paid by mistake—Will—Overpayment of interest on legacy
—Recovery back—Interest on overpayments—Account.*

Where a testator bequeathed a legacy to be paid by the devisee of certain lands through the executor in twenty semi-annual instalments, with interest at the rate of six per cent., payable at the time of each instalment on the amount of such payment to be computed from the time of his decease; and by mutual error, interest was paid with each instalment upon the whole amount of principal then remaining unpaid, which payments of interest were consumed by the legatee as income, while he invested the instalments of principal, and the legatee now brought this action against the executor and devisee claiming an instalment as still due, the defendants alleging that he had been overpaid, and asking an account:—

Held, by MEREDITH, J., that the overpayments of interest were made under mistake of fact, and could be recovered or set off: and that the plaintiff, by reason of the overpayments, was enabled to, and did, invest just so much more of the *corpus*, at interest, and so, in effect, got, and should be charged with interest upon the overpayments: and, it being admitted that upon this footing the plaintiff was fully paid, dismissed the action:—

Held, by the Divisional Court, affirming that judgment: that the overpayments were made under a mistake of fact and might be recovered or set off; but varying it: that an account should be taken, and that all the payments made should be brought into account and applied, but without addition of interest, to the aggregate of the amounts properly due and payable under the will, and any balance due to plaintiff ascertained.

Corham v. Kingston, 17 O. R. 432, and the *United States v. Sanborn*, 135 U. S. R. 271, specially referred to.

Statement.

THIS was an action brought by Joseph Barber against J. P. Clark, executor and trustee under the will of the late James Barber, who died on May 19th, 1880, and John R. Barber, to whom, as the statement of claim set out, the testator devised and bequeathed his paper mills and real estate (with certain exceptions) and charged his said real estate with payment of certain legacies, including one to the plaintiff of \$60,000, to be paid by John R. Barber to J. P. Clark, as executor and trustee as aforesaid, and by him to the plaintiff.

The bequest in question was in the following words: "And I specially charge and make chargeable the said real estate so devised, to my son John R. Barber, with the further

sum of \$60,000, to be paid to my executor and trustee for my said son Joseph Barber, his heirs and assigns, in twenty equal semi-annual payments, commencing six months after my decease, and to bear interest at the rate of six per cent. payable semi-annually at the time of each of such payments on the amount of such payment to be computed from the time of my decease, which said sum of \$60,000 I hereby give and bequeath to my said son Joseph Barber, his heirs and assigns, absolutely, secured as aforesaid." Statement.

And the plaintiff alleged that he had received and accepted from the defendants nineteen of the semi-annual payments, amounting in all to \$57,000, and the interest on the said instalments or payments from time to time, "as and in the manner the said payments of interest were at the time of each payment, made and appropriated by the said executor and John R. Barber, and the plaintiff claimed payment of the last instalment of \$3,000 and interest to the amount of \$360, which they said the defendants refused to pay.

By his statement of defence, John R. Barber alleged that he had paid and satisfied the whole of the said sum of \$60,000 and interest, while Clark alleged, amongst other things, as follows :

5. The said defendant further alleges that it appears upon the examination of the accounts between the plaintiff and John R. Barber, that John R. Barber has paid to the plaintiff interest from year to year upon the unpaid principal money of the said legacy instead of upon the amount of each payment ; that upon a proper taking of the accounts in accordance with the terms of the said gift there would be a large balance recoverable from the plaintiff.

6. The said defendant denies that he ever appropriated or intended to appropriate any money to the said plaintiff by way of anticipation of the payments directed by the said will and submits that the mistake should be rectified, a proper account taken, and that the plaintiff should be ordered to repay the balance." And he counter-claimed

Statement accordingly, and asked to have all necessary accounts taken, and to be discharged and released from the office of executor and trustee of the will.

The action came on for trial at the Chancery Sittings on November 24th, 1890, at Toronto, before Mr. Justice Meredith.

The trial Judge deemed it manifest that no reference was necessary, because, if interest or profit upon overpayments were not chargeable, the order of payment, of the same amounts of interest had been merely reversed, and the balance of the *corpus* would be yet payable, with interest thereon, and any account entirely unnecessary.

The result of the evidence taken sufficiently appears from the judgments.

November 24th, 1890. MEREDITH, J.:—

The legacy is, by the will, made payable in twenty semi-annual payments, with interest, at the rate of six per cent. per annum, payable semi-annually, at the time of each of such payments, on the amount of such payment.

The interest was, from time to time, paid, not upon the amount of the payment, but upon the whole amount of the legacy remaining unpaid. Eighteen payments were thus made when the alleged error was discovered, and thereafter two sums were paid, by the defendants, with a full knowledge of the facts; the last payment being intended by them as a satisfaction of the legacy. And thus, according to the uncontradicted testimony of the defendant Barber, although the whole of the said twenty payments have not been made, the plaintiff has received more than, if the defendants' contention as to the interest be correct, he was entitled to, in respect of this legacy.

It was contended for the plaintiff that the way in which the interest was paid is in accordance with the provisions of the will; but I hold that this is clearly not so; and the question remains whether there is any relief for the defendants in respect of the overpayments.

The defendant Barber, in his pleading, treats them as Judgment payments on account of the legacy, and contends that it is Meredith, J. therefore satisfied.

The other defendant, in his pleading, treats them as overpayments made in mistake, and, by counterclaim, seeks to recover the amount paid in excess of the amount of the legacy and interest properly computed.

The only defence to this counterclaim is a joinder of issue.

I am of the opinion that the overpayments were made under a mistake of fact.

I find that the parties overlooked the provision of the will making the interest payable "on the amount of the payment" only.

I think that the *advantage* which the plaintiff received by the overpayments of interest [pointed out during the argument] may be applied in satisfaction of the later underpayments of interest and the balance of the legacy, and that the plaintiff has accordingly been paid in full, and has now no claim on either of the defendants in respect of this legacy.

The action will, therefore, be dismissed, but it will be dismissed without costs, for I find that the negligence of the defendants is, in a large measure, accountable for the difficulty which has arisen, and this litigation.

The counterclaim will also be dismissed without costs.

The plaintiff now moved, by way of appeal, to the Divisional Court, and the motion was argued on January 20th, 1891, before BOYD, C., and FERGUSON, J.

The special grounds of objection taken in the notice of motion were :

(1.) That the mistake, if any, in the mode of payment of the plaintiff's legacy by the defendants was a mistake of law and not of fact.

(2.) That after crediting the amount of the alleged overpayments upon those instalments of the plaintiff's legacy coming due thereafter in accordance with the said judgment, there would be due to the plaintiff the amount claimed by the plaintiff in this action in respect of the said legacy.

Argument.

Kilmer, for the plaintiff. The mistake was that of the executor and devisee, and we should not have to pay interest, that is damages, on account of the overpayment. We are willing to account for all overpayment on account of the legacy, and interest as it should fall due, but not to credit overpayments on the principal, or to have them bear interest: *Gittins v. Steele*, 1 Sw. 199; *Jervis v. Wolferstan*, 18 Eq. 18; *Webster v. British Empire Mutual Life Ass. Co.*, 15 Ch. D. 169, 178; *Caledonian R. W. Co. v. Carmichael*, L. R. 2 H. L. Sc. 56; *Re Ross*, 29 Gr. 385.

Macdonald, Q. C., for John R. Barber. We say that the overpayments should be applied immediately to reduce the principal bearing interest: *Merriman v. Ward*, 1 J. & H. 371, 377; *Daniell v. Sinclair*, 6 App. Cas. 181, 189.

Kappelle, for the executor.

February 3rd, 1891. BOYD, C. :—

The plaintiff is entitled to a legacy of \$60,000 charged by the father's will on land devised to the plaintiff's brother who is the defendant Jno. R. Barber. By the terms of the will this sum was to be paid to the executor of the will for the plaintiff in twenty equal semi-annual payments, commencing six months after the death, and to bear interest at the rate of six per cent. payable semi-annually at the time of each of such payments on the amount of such payment to be computed from the time of the decease.

Eighteen of such half-yearly payments of \$3,000 principal have been made, but interest has been paid half-yearly on the whole amount of principal money unpaid as upon a mortgage, instead of interest computed merely upon each \$3,000. This arose from common error and mistake, and it is not now disputed that these overpayments of interest should be brought into the account. An account is asked by the defendants in their defence, and the only matter that is now to be determined is the manner in which the account shall be taken. The evidence shews that the moneys were paid so as to separate principal and interest

and that the interest payments were consumed by the plaintiff in living expenses, whereas the principal moneys were invested by him from time to time. It thus appears that the overpayments are attributable solely to moneys paid as interest, received as interest, and expended from time to time without becoming productive in the hands of the plaintiff.

Judgment.

Boyd, C.

Had the overpayment of interest been detected at the outset the defendant would have had the right to recover it from the plaintiff—but such a recovery would not have been with interest—but just the neat sum in respect of which the common error and mistake existed. The right to require interest on these overpayments ought not to be bettered by mere effluxion of time. It was contended not so much that interest should be charged on the overpayments as that the amount overpaid should be forthwith applied in reduction of the principal of the legacy. But that would be, I think, unfair, as going to diminish the interest-bearing fund in acceleration of the time appointed for payment. The reason in *Corham v. Kingston*, 17 O. R. 432, against changing the terms of the contract apply *pro tanto* to this case.

The fair and reasonable way of dealing appears to me to take all the payments made into account and apply them (without addition of interest) to the aggregate of the amounts properly due and payable under the terms of the will and so ascertain if any balance. This holding conforms to decisions upon kindred points, some of which may be noted. In *United States v. Sanborn*, 135 U. S. R. 271, it was held by the Supreme Court that when the Government makes a long delay in the assertion of its right to recover money which it is entitled to recover without showing some reason or excuse for the delay, interest before the commencement of the action for such recovery is not to be allowed; and this is especially true when it does not appear that the defendant has earned interest upon the money improperly received by him.

The delay of the defendant to sue directly for the re-

Judgment
Boyd, C.

covery of the moneys unpaid, would have barred him after six years, and his inaction otherwise operates to deprive him of interest: *Edwards v. Warden*, 1 App. Cas. 281.

In *Onge v. Truelock*, 2 Moll. 44, the case of a legatee refunding an overpayment, was referred to, and Lord Plunkett said such a repayment does not on principle carry interest. The like holding by Sir George Jessel, is to be found in *Jervis v. Wolferstan*, 18 Eq. at p. 27, and there recognized as the established doctrine of the Court.

Interest does not arise in this case under the terms of the statute R. S. O. ch. 44, secs. 85-88, nor under what is called the equity of the statute: *Webster v. British Empire Mutual Life Ass. Co.*, 15 Ch. D. 179, and cases therein cited. It appears to me perfectly clear upon authority that interest cannot be allowed upon the overpayments, and though upon the submission and on the authority of *Daniell v. Sinclair*, 6 App. Cas. 189, there may be a general accounting in respect of all sums received and paid, that must be upon the line above indicated.

The costs should be allowed to the successful party on the taking of accounts only, as if this cause had been heard below on motion for judgment to account, (no costs of this appeal being allowed.)

FERGUSON, J.:—

The facts regarding the legacy have been briefly, but I think accurately and sufficiently stated by the Chancellor. What are called the "overpayments" to the plaintiff, the legatee, are said in the pleading of the defendant Clark, to have arisen by payment of interest on the whole unpaid amount of the legacy with each instalment of it instead of interest upon the amount of the instalment itself. It is now conceded that such was the fact, and that the error arose by the mistake of both parties, that is the executors and the legatee. The defendant Clark asks by his pleading that this mistake should be rectified, and an account taken. The plaintiff now desires that an account should be

taken, contending that upon the proper taking of an Judgment account a large balance will be found still owing to him Ferguson, J. on account of his legacy. The plaintiff does not object to the correction of the mistake, or to account for the amounts that were from time to time overpaid to him as interest with each instalment of the legacy. The action is for the payment of the last instalment, \$3,000 and interest, and if necessary, to have an account taken and the lands on which the legacy is charged sold for the payment of what may be found due and unpaid.

What is really in dispute between the parties is whether or not these overpayments should be accounted for with interest upon them, by the plaintiff, or only the sums actually overpaid without any interest or income arising upon the same.

I do not perceive for the purposes of this contention any material difference between the overpayment and a legacy erroneously paid to a legatee. It is in effect the recalling of payments erroneously made by mistake, as is now admitted, by not properly reading the will.

In the case *Gittins v. Steele*, 1 Swans. at p. 200, the Lord Chancellor (Lord Eldon) said: "If a legacy has been erroneously paid to a legatee who has no further property in the estate, in recalling the payment I apprehend that the rule of the Court is not to charge interest; but if the legatee is entitled to another fund making interest in the hands of the Court, justice must be done out of his share:" Williams on Executors, 8th ed., p. 1459. That was also a case of refunding sums paid under an erroneous construction of a will. In the case *Jervis v. Wolferstan*, 18 Eq. 18, referred to at the bar, it was held that an executor who compels a legatee to refund can recover only the capital sum which he has paid to the legatee without any intermediate income. Sir George Jessel in delivering judgment, at p. 27, said: "On the other hand it has been thought to be a hardship that a man may not spend the income of what he has been paid, and the doctrine is now established, that, if an executor receives back assets he

Judgment.
Ferguson, J. cannot recover any of the income, but he must take only the capital." Other cases might be referred to on the subject, but it does not seem to me to be necessary. The proposition, whether entirely logical and just or not, must, I think, be taken as established. Then if on any occasion of an overpayment as above, the executor had, shortly or within any reasonable interval after making the payment, brought his action to have the amounts so overpaid out of the estate refunded, the recovery would be for the precise amount without any income or interest, and one does not see how the lapse of a long period after any such overpayment can make a difference in this respect. The case *United States v. Sanborn*, 135 U. S. at p. 281, referred to by the Chancellor, and the case mentioned in that case, seem, at least, to afford a guide on this subject. There had been a payment of a large sum on account of what was called a misapprehension resulting from representations made. I think what appears by the authorities is that in a case such as the present one the refunding or accounting should be in respect of the principal sums overpaid only without any interest or income.

The final contention of the defendant differed somewhat from a contention made directly that interest should be charged against the plaintiff upon the overpayments for the time that they were or have been respectively in his hands. It was this—that, in taking the accounts, there should be such an application made of each such overpayment upon the amount of the legacy, that the result of the accounting would be the same, or about the same, as if interest were charged directly against the plaintiff upon each overpayment.

I do not perceive that what cannot be done directly may be brought about indirectly, and the view that I take is simply this: the plaintiff was entitled to be paid his legacy in full according to the provisions of the will that have regard to it: the claim he makes here, is for an alleged balance still owing to him: the defendant's claim that

seems proper on the authorities, to be allowed against this ^{Judgment.} claim of the plaintiff, is composed of these respective over-^{Ferguson, J.} payments added together without any interest or income; and I am of the opinion that in this simple way the accounts should be taken. If the account is taken in any other manner, or so as to bring about a result different as against the plaintiff from the one that would be brought out in this way, the effect, or one effect must be to make the plaintiff pay or allow interest upon the respective overpayments, which, as it appears to me, would, whether logical and just or not, be against the authorities.

I agree in the disposition of the costs made by the Chancellor in his judgment.

A. H. F. L.

[CHANCERY DIVISION.]

RE WILSON AND HOUSTON.

Vendor and purchaser—Conditions of sale—Taxes due up to time of sale.

A mortgagee, under two mortgages, sold the land under the power of sale in the second, and by his conditions of sale stipulated amongst other things that he was selling merely all his estate or interest under the the second, subject to the first mortgage and interest; that if a second mortgage was taken for part of the purchase money, it should be a first lien after the first mortgage and interest; that if no objection was made within a certain time the vendor's title was to be held good and considered accepted by the purchaser, and the vendor entitled to the consideration; and further that the said first mortgage could be paid off:—*Held*, that taxes due up to the date of the sale should be paid by the vendor.

Statement.

THIS was an application under the Vendor and Purchaser Act, R. S. O. ch. 112.

The vendor was a mortgagee of the land in question under two mortgages, one for \$5,000 and one for \$2,500, and he sold under the power of sale in the second, as stated in the conditions, "all the estate or interest which he is thereby empowered to sell subject to a mortgage for \$5,000 and interest as hereinafter mentioned," etc.

The conditions of sale were long and special—the first being as above; the second as to terms of payment; the fourth that if a second mortgage was taken in part payment of the purchase money it should be a first lien after the first mortgage and interest; the sixth that the vendee should search the title at his own expense; the eighth that if no objection was made within ten days after sale, and was held good, the title should be deemed to be accepted by the purchaser and the vendor entitled to the consideration money; and the eleventh that the property was sold subject to the \$5,000 mortgage and interest, which could be paid off: all these conditions but the sixth being more fully set out in the judgment.

The sale took place on November 24th, 1890, and when it was about to be closed it was discovered that the sum of \$113.40 taxes for the year 1890 up to that date were un-

paid, which neither party was aware of, and the question ^{Statement.} was, who should pay them, as the purchase money was only sufficient to satisfy the mortgage.

The petition was argued on February 4th, 1891, before FERGUSON, J.

E. D. Armour, Q. C., for the vendor Wilson, the petitioner. The purchaser should pay these taxes, as the ordinary rule of apportionment to the date of the sale is varied by the specific conditions of sale protecting the vendor. The first condition stipulates that he "merely exercises his rights to sell under the said mortgage all the estate or interest which he is thereby empowered to sell subject to a mortgage for \$5,000 and interest," etc. That left the first mortgage a charge with all its incidents, one of which was the right to pay these taxes and add them to the mortgage; but there was no obligation to pay them, even if the purchaser chose to pay this mortgage off under the eleventh condition. I refer to *Nash v. Wooderson*, 52 L. T. N. S. 49, and *Hume v. Bentley*, 5 DeG. & Sm. 520.

Again, as the vendor only offered an equity of redemption for sale, he is not bound to pay the taxes, for taxes are charged on the land not on the equity of redemption. There should therefore be an apportionment, as between the incumbrances.

W. M. Douglas for the purchaser. The taxes are a charge on the land. Apart from the conditions of sale they should be paid by the vendor. The purchaser bought subject to the first mortgage and interest only. Condition six shews there was to be an investigation of title and he was entitled to enquire as to the encumbrances. The vendor reserved to himself under condition eight the right to annul the sale if he is unwilling to remove any objections, and he can do that if he will not pay the taxes. If the vendor was merely selling his interest, the purchaser could ascertain that and offer him so much and there would be no

Argument. necessity for any conditions. The mention of the first mortgage shews no other incumbrance was anticipated. The conditions must be construed most strongly against the vendor. I refer to *Waddell v. Wolfe*, L. R. 9 Q. B. 515; *McIntosh v. Rogers*, 14 O. R. 97.

Armour, Q. C., in reply. This matter is not a question of title under condition six. A purchaser may be precluded from making requisitions but that does not prevent him making objections.

February 17th, 1891. FERGUSON, J.:—

The petition is by the vendor. It is presented under the provisions of the Act of Parliament. The contention is as to how the taxes for the year 1890 should be borne and paid as between the vendor and purchaser. These taxes, as stated at the bar, amount to the sum of \$126. This sum, however, is inclusive of the commission added pursuant to the provisions of the Assessment Act, as was said. This is the sole difference between the contending parties.

As shewn by the petition, the vendor was the holder of two mortgages on the property, the first or earlier mortgage being for the sum of \$5,000 with interest.

The sale, however, took place by an exercise of the power of sale contained in the second mortgage and was made subject to the charge on the land occasioned by the prior mortgage for \$5,000 and interest. The position may be put in this way: The second mortgage was a charge upon the equity of redemption after the execution of the first mortgage, and the sale was virtually a sale under the power of sale (contained in the second mortgage) of this equity of redemption.

Mr. Armour for the vendor concedes that if the case fell under the ordinary rule there would be an apportionment of these taxes.

The sale took place late in 1890, in November, I think,

and it was said in the argument, and is shown by the petition, that the amount which on an apportionment would fall upon the vendor would be \$113.40. The contention, then is really about this sum. Judgment.
Ferguson, J.

The vendor contends that owing to the effect of the first, fourth, eighth, and eleventh conditions of the conditions of sale the vendor is relieved from the obligation to bear or pay any portion of these taxes, and that the purchaser must bear and pay the whole of them. The purchaser is willing to bear and pay his part upon an apportionment which would be only a small part.

The first condition is: "The vendor merely exercises his right to sell under said mortgage all the estate or interest which he is thereby empowered to sell, subject to a mortgage for \$5,000 and interest as hereinafter mentioned; and the purchaser must at his own expense satisfy himself as to the estate and title of the vendor and the condition, possession and value of the property."

As I understand the matter, no question is raised in respect of the estate or title of the vendor, or the condition, possession, or value of the property sold, and by the power of sale the vendor was empowered to sell the equity of redemption in the land.

The fourth condition has regard to the manner of the payment or satisfaction of the purchase money, and I do not perceive how any part of it can affect the question here unless possibly the part that provides that in case a mortgage should be given for part of the purchase money this should be a first lien and security after the charge of \$5,000 "and interest as hereinafter mentioned."

The eighth condition provides for the giving of notice within ten days from the date of the sale, in the case of any objection to the payment or satisfaction of the purchase money, and in case of no such objection, etc., etc., the title shall be deemed to be accepted by the purchaser, and the vendor shall be entitled "to the consideration money as above stated." The remainder of this condition seems to have regard to rescission of the contract in certain events.

Judgment. I am unable to perceive how this condition affects the question here, unless possibly the words "entitled to the consideration as above stated" do so.

Ferguson, J.

The eleventh condition is: "The property will be offered for sale subject to a mortgage and lien to the vendor for \$5,000 and interest thereon at the rate of nine per centum per annum from the 13th day of December, A.D. 1889; but that mortgage may be paid off forthwith if the purchaser so desires, the amount being now due."

The contention of the vendor seems, so far as I can understand it, to be that, the first condition mentioning, as it does, the \$5,000 mortgage and interest "as hereinafter stated"; the fourth condition providing in a certain event for a first lien after the \$5,000 mortgage and interest as thereafter mentioned; the eighth condition saying that in the events there referred to the vendor shall be entitled to the consideration or security "as above stated," and the eleventh condition referring to the \$5,000 mortgage and interest thereon for the period stated, saying that the purchaser, if he so desires, may pay off that mortgage forthwith after the purchase as the amount is due, the effect is:—that this \$5,000 mortgage with the interest upon it, which is mentioned is the sole and only charge upon the land by which the vendor in his transaction with the purchaser is affected, and that therefore the purchaser must bear and pay these taxes (which are an encumbrance on the property sold and a charge upon the land itself).

Counsel put the case: Suppose the purchaser were now to redeem or pay off this \$5,000 mortgage, he could do so by paying the principal and interest, and the mortgagee could not add to the sum of these, any sum paid or allowed by him for taxes on the land, and this by reason of this eleventh condition; the effect being that if the vendor allow or pay as an apportionment this \$113.40, he will forever lose it, there being no surplus in his hands after satisfaction of his second mortgage, the one under which the sale took place.

I do not think that such is the meaning of this eleventh

condition. It seems to me simply to call the attention of intending bidders to the fact that there existed this \$5,000 mortgage and the interest upon it as a charge upon the land and that the money was overdue, and I do not see that it limited or lessened the rights of the vendor in regard to this \$5,000 mortgage. Besides, the purchaser might not elect to pay it off pursuant to this eleventh condition or anything contained therein, and in such case the vendor would surely retain and have all his rights upon the \$5,000 mortgage. Even if this view of the meaning of the eleventh condition were not taken to be the proper one, I should be unable to read the four conditions relied upon by the vendor so as to arrive at the result contended for by him, and I humbly think that they are incapable of being so read.

Judgment
Ferguson, J.

Surely a sale of land subject to a \$5,000 mortgage would be a sale subject to all the rights of the mortgagee upon that mortgage and would involve notice to any intending purchaser of all such rights. Stating from what time the interest upon the mortgage is unpaid is simply giving a little more information on the subject, and I do not see how making these statements, and adding that the money secured by the mortgage is overdue, can curtail or diminish the rights of the mortgagee in such mortgage or prevent him from adding to his mortgage debt sums that otherwise by law he would be entitled to add, such as insurance premiums where contracted for, taxes or the like.

Even if the vendor were by reason of his conditions of sale precluded from adding taxes to his mortgage debt under the \$5,000 mortgage, that would not, I think, constitute a reason for his compelling the purchaser to take his purchase subject to an encumbrance not mentioned or referred to at all. He was simply mortgagee by two mortgages upon property insufficient in value to satisfy both mortgages. A purchaser may before conveyance apply purchase money in paying off encumbrances upon the land. After conveyance he can only do so in the absence of fraud or the like, where the encumbrance falls within the scope

Judgment. of the covenants he takes. A purchaser should not be deprived of this right except by reasonably clear stipulations, and I do not think the conditions relied on by the vendor contain such stipulations in any view that can be taken of them; and so far as I am able to perceive the purchaser should have his purchase, this equity of redemption, free from the encumbrance of these taxes, whatever may be the rights in respect of the \$5,000 mortgage so far as they have concern, when that mortgage is enforced or sought to be paid off. I may add that the eleventh condition, as I read it, does not say that the \$5,000 mortgage may be satisfied by paying the principal money and so much interest. It merely states the existence of the mortgage, the time for which the interest at the rate mentioned is in arrear, and that "that mortgage" may be paid off forthwith, the money being overdue. This is consistent with the mortgagee making a claim for all sums that in the ordinary case he could add to the sum of the principal and interest of the mortgage.

There being but the one question: It being conceded that but for these four conditions there should be the apportionment of the taxes in question, and the respondent having been always willing that this should take place, the petition should, I think, be dismissed with costs.

Petition dismissed with costs.

G. A. B.

[CHANCERY DIVISION.]

ZILLIAX V. DEANS ET AL.

*Fraudulent conveyance—Voluntary settlement—Conveyance of land to wife
—Attacking creditor—Claim under \$40.*

A creditor for an amount under \$40 cannot attack a conveyance of land as voluntary or fraudulent and he cannot improve his position by bringing his action on behalf of other creditors.

THIS was an action brought by George Zilliax on behalf ^{Statement.} of himself and all other creditors of the defendant John Deans, against John Deans and his wife Mary Ann Deans, to set aside two conveyances made to her.

The action was tried at Stratford, on October 13th, 1890, before ROBERTSON, J.

J. L. Darling and Mabee, for the plaintiff.
Idington, Q.C., and E. F. B. Johnston, Q.C., for defendants.

It appeared that at the time of the commencement of the action the plaintiff was a creditor of the defendant John Deans, as the holder of a note for \$112.12, which note was given to close up a store account, the amount of which was only \$36 at the time the last of the conveyances in question was made.*

The learned trial Judge was of opinion that there was no fraudulent intent, and that there being no debt due at the beginning of the action which was in existence at the time the conveyances were made except the sum of \$36, which was due when the last of the conveyances was executed, and as that sum was below the amount necessary by "The Division Courts Act," R. S. O. ch. 51, secs. 223, 224, 226, to obtain a transcript of a judgment to the

* A good deal of evidence was taken as to the financial standing of John Deans at the time this conveyance was taken to the wife, and how much of the consideration money was paid by him, but as the action went off on another point it is not necessary to refer to it.—R&P.

Statement. County Court for the purpose of issuing execution against lands thereon, he dismissed the action with costs.

From this judgment the plaintiff appealed to the Divisional Court, and the appeal was argued on February 12th, 1891, before BOYD, C., and FERGUSON, J.

Shepley, Q. C., for the appeal. If a man who is indebted makes a voluntary settlement it is fraudulent under the 13 Elizabeth c. 5. The evidence shews his wages paid for this property which he had the vendor convey to his wife. If the plaintiff's claim is now sufficient to attack the settlement, the fact that it was not large enough to obtain an execution against lands at the time the settlement was made makes no difference. The intent was fraudulent, even if the claim was, then too small. The settlement was voluntary, and the settlor was indebted: *May on Fraudulent and Voluntary Dispositions of Property*, 2nd ed., 40. It is not necessary to prove the intent, the circumstances are sufficient: *May*, 40 & 41.

Idington, Q. C., contra, was not called on.

BOYD, C.:—

My brother and I agree that we cannot interfere on this appeal. The first transaction of the year 1878 cannot be attacked. Deans was then perfectly solvent; the evidence shews he had about \$800 worth of property, and a debt of only \$10, and even that debt is alleged to have been paid. Under these circumstances he cannot be accused of fraud when the first conveyance was taken to the wife, and, furthermore, the plaintiff was not then a creditor and cannot be heard to complain as to that conveyance.

Then as to the second conveyance, in the year 1883, the plaintiff is in no better position. Even if Deans had taken that conveyance to himself the plaintiff, being a creditor only to the amount of \$36, was not in a position

to attack it as he had not a claim sufficient in amount to reach the land, and he cannot make his position any better by suing on behalf of other creditors.

Judgment.
Boyd, C.

There may be judgment against Deans for the amount due by him, but otherwise the judgment appealed from must be affirmed with costs.

FERGUSON, J., concurred.

G. A. B.

[CHANCERY DIVISION.]

THE CORPORATION OF THE TOWN OF MEAFORD V. LANG
ET AL.

Principal and surety—Official bond—Collector of taxes—Municipal corporations—Release of sureties—Non-disclosure—Constructive fraud.

In an action by a municipal corporation against the sureties to the bonds of a defaulting collector of taxes, for the due performance of his duties for 1886 and 1887, it appeared that there had been great laxity on the plaintiffs' part, but that shortly before the collector absconded, in 1888, a majority of the members of the corporation had confidence in his honesty; while the defendants had not sought information from the plaintiffs as to the way he had performed his duties in former years:

Held, that the non-disclosure by the plaintiffs to the defendants of a motion having been made in council in 1885 that if the roll for 1884 was not returned by the next meeting, an enquiry before the County Court Judge would be asked for; or of a resolution in August, 1885, instructing the treasurer to take proceedings against the collector and his sureties for the balance due on the 1884 roll, unless fully settled before September 10th, next, which it was; or of another like resolution in 1886, in reference to the taxes of 1885, which were afterwards, in 1888, paid over in full by him, and of the non-return by him of the 1885 roll until 1888, were not such non-disclosure as amounted to constructive fraud, on the plaintiffs' part sufficient to relieve the defendants from liability on their bonds.

Corporation of the Township of Adjala v. McElroy, 9 O. R., 580, specially considered.

Decision of MACMAHON, J., 20 O. R. 42 affirmed.

THIS was a motion by the defendants before the Divisional Court by way of appeal from the decision of MACMAHON, J., in this case, reported 20 O. R. 42, where the facts are fully set out.

Argument. The motion was argued on January 20th, 1891, before FERGUSON and MEREDITH, JJ.

J. K. Kerr, Q. C., for the defendants. We say that there was such a concealment that the sureties were discharged *ab initio*. The concealment of facts material to the obligor at the time of his entering into a bond, amounts to such a constructive fraud as relieves him from responsibility. In Thompson on Liabilities of Directors and other Officers of Corporations, p. 520, the general doctrine is stated. See also, *ib.* p. 524; *Railton v. Mathews*, 10 Cl. & F. 934; *The Mayor of Durham v. Fowler*, 22 Q. B. D. 394; *Corporation of Gananoque v. Stunden*, 1 O. R. 1. *Township of Adjala v. McElroy*, 9 O. R. 580, is almost a parallel case to this. [MEREDITH, J.—What was concealed? All that was suspected was exposed in open council and reported in the newspapers: it is not like the ordinary case of master and servant.] The council here shewed that they were suspicious of Watt. If the circumstances concealed were of such a character as that he should not have been appointed to an office, so they were of such a character as that he should have been dismissed from office. See also *Davies v. London and Provincial Marine Ins. Co.*, 8 Ch. D. 469. [MEREDITH, J.—The evidence seems to be that the sureties knew of the proceedings in the Council; knew as much as the members of the Council; and executing bonds after that were they not, in effect, saying there is nothing wrong; though slow the Treasurer is honest; go on trusting him?] As there had been a prior employment of this man which had been unsatisfactory and known to them, they should not have appointed him in 1885 or 1886; and having done so, finding him pursuing the same line of conduct, they should have communicated it to the sureties. [MEREDITH, J.—Knowing as much as you now must admit the sureties knew was it not for them to enquire?] Under the statute, R. S. O. 1887, ch. 193, secs. 132, 133, though the council could continue the authority to go on and collect the unpaid taxes, they had no power to extend pay-

ment over of moneys already collected. The council tied ^{Argument.} their hands beyond what the statute authorized; and in so extending time to Watt, they released us. [MEREDITH, J.—No; if the extension were within the statutory provision the sureties' liability is expressly preserved; if not within it, the extension was *ultra vires*, and did not tie any one's hands.] Moreover they departed from our contract and thus released us: De Colyar on Guarantees, (Blacks. ed.) pp. 274, 278, 281; *Polak v. Everett*, 1 Q. B. D. 699.

W. Cassels, Q. C., for the plaintiffs. The question is greatly one of fact. There is no suggestion of dishonest conduct on Watt's part. He was lax in returning his rolls, not from a dishonest motive, but in the interest of the municipality so far as we can tell. [MEREDITH, J.—However unwise and reprehensible it may be from a business point of view, tardiness in the collection of taxes is often the rule rather than the exception; poverty and other excuses very often prevail; in that respect this is not an unusual case.] The cases relied upon belong to a different class: *Corporation of Gananoque v. Stunden*, 1 O. R. 1, was one of fraudulent misrepresentation made at the time of the contract. In *Township of Adjala v. McElroy*, 9 O. R. 580, during the bond the man was guilty of the grossest dishonesty, of which the council was aware. It all comes back to the point that there must be connivance. Where there is a bond, and during the bond there is gross dishonesty known to the employer, he is bound to dismiss the employee or notify the sureties. The sole ground alleged here is laches, in regard to the way the rolls were prepared: *Mayor of Durham v. Fowler*, 22 Q. B. D. 394, shews that it does not release the sureties.

Kerr, in reply. *The Mayor of Durham v. Fowler*, 22 Q. B. D. 394, was one of mere passive acquiescence, mere passive inactivity. Here the council had been guilty of very great activity.

Judgment. February 18th, 1891. FERGUSON, J. :—

Ferguson, J.

The statement of claim is not far from being in what was, before the passing of the Judicature Act, the common form of counts or declarations upon the respective bonds sued on. A leading paragraph in the defence to each of these claims (upon the respective bonds) sets up that the plaintiffs at the time of the execution of the bond had knowledge of certain and divers defaults of Watt, their collector, who had held the office during several previous years, and that the plaintiffs designedly neglected to notify the defendants thereof. Another paragraph apparently pleaded to both statements in the claim of the plaintiffs is that during the years respecting which the bonds sued on were in force, Watt "committed defaults" to the knowledge of the plaintiffs, and that the plaintiffs neglected to discharge him and notify the defendants of such defaults. The issues raised upon these defences were the ones that were the subject, or chiefly the subject of the argument before us, it being apparently considered or thought by counsel, and, so far as I can see, properly so, that the questions raised by the other matters of defences stated, were comprehended in the reference ordered by the learned Judge, and were matters to be worked out upon that reference, and on further directions, which together with costs were reserved till after report.

In each of the two issues first above referred to the question for trial was, fraudulent concealment by the plaintiffs, at the times of the making of the respective contracts sued on, of material facts, or not.

In regard to the other issue which has respect to alleged defaults of Watt after the times of the making of the respective contracts alleged to have been known to the plaintiffs, and then not discharging Watt and giving notice to the defendants, it was, as I understood, conceded, and I think rightly, that unless the evidence shews *connivance* on the part of the plaintiffs the defendants could not succeed upon the issue.

The case is now reported 20 O. R. 42. The learned Judge has made a concise yet tolerably full statement of the facts, and has dealt with them, and the law bearing upon them in a somewhat elaborate and as I happen to think an able manner.

Since the argument I have perused the evidence and the exhibits with the view of ascertaining whether or not the learned Judge had in my opinion fallen into error in regard to his finding, or the view that he took of the effect of the evidence, and, after having done so and examined with as great particularity and care as I have been able, the parts of the evidence specially referred to by counsel, I do not dissent from his view as to the effect of the evidence so far as he has expressed it.

I do not think that the fraudulent concealment virtually alleged on which the first above two issues were joined, is made out by the evidence; and I have no desire to repeat the authorities referred to by the learned Judge in support of the view which I think fully sustain his conclusion.

In regard to the other, the third above issue, I am of the opinion the connivance is not made out by the evidence. The case in this branch of it, I think much more nearly resembles the case *The Mayor of Durham v. Fowler*, 22 Q. B. D., 394, than it does *The Corporation of Adjala v. McElroy*, 9 O. R. 580, in which latter case, though the word does not seem to have been employed, connivance if not much more does appear, and I do not see that the principles of *Phillips v. Foxall*, L. R. 7 Q. B. 666, which case I had occasion to consider in *Exchange Bank v. Springer*, 7 O. R. 309, or of *Sanderson v. Aston*, L. R. 8 Ex. 73, are applicable to the present case, as they were held to have been in *Corporation of Adjala v. McElroy*. These cases are referred to, and another view of them presented in *Mayor of Durham v. Fowler*, 22 Q. B. D. 394. The learned Judge finds in the present case that while the plaintiffs regarded Watt as being altogether too lenient in enforcing prompt payment, their faith in his honesty remained unshaken till within a short time of his

Judgment.
Ferguson, J. leaving the country, and I cannot reasonably quarrel with this finding. There was no known fraud or misconduct. There was only this supposed leniency in enforcing payment of the taxes ; and as I understand the matter, there was no condonement such as that referred to or spoken of in *Byrne v. Muzio*, 8 L. R. Ir. 410, a case referred to by the Chancellor in *Corporation of Adjala v. McElroy*, 9 O. R. 580.

On the whole case, I am of opinion that the judgment should be affirmed with costs.

MEREDITH, J. :—

I agree in dismissing the motion with costs ; and having, during the argument, expressed my views against the several contentions made by Mr. Kerr for the defendants, need not now repeat them ; but I need add only that further consideration of the case has given me no cause for changing my views, nor discovered any good reason for relieving the defendants from liability upon the bonds in question.

A. H. F. L.

[COMMON PLEAS DIVISION].

FLEMING v. THE CORPORATION OF THE CITY OF TORONTO.

Municipal corporations—Local improvements—Necessity for by-law—Indefiniteness of resolution.

The council of a city by a resolution confirming the report of the Committee on Works, authorized the corporation to enter into an agreement with certain railway companies—who were liable to maintain and keep in repair the existing bridges over their tracks on a certain street—whereby the corporation were to build as a local improvement two new bridges over said tracks at an approximate cost of \$75,000, \$20,000 thereof to be paid by the railway companies in full of all liability, \$30,000 by the corporation as their respective shares, and \$25,000, the estimated damage to lands, to be assessed against the properties fronting on the street. No provision was made in the estimates for the current year for the payment by the corporation of the amount to be paid by them :—

Held that before the expenditure could be brought within the local improvement clauses of the Municipal Act, a special by-law must be passed fixing the amount or proportion of the cost of the work to be assumed by the city and to be assessed on the locality, and declaring the opinion of the council to be that the work was necessary, and that it would be inequitable to charge the whole cost of it upon the locality ; and that the fact of there being a general by-law passed under sec. 612, sub-sec. 1 (a) for determining property to be benefitted by a proposed local improvement was not sufficient : but, even if a by-law were unnecessary, the resolution was too indefinite, as it could not be gathered with certainty therefrom what proportion of the cost was to be imposed on the property to be locally assessed.

An interim injunction was granted restraining the corporation from acting under the agreement.

THIS was a motion to continue an injunction granted *Statement. ex parte*, by MacMahon, J., restraining the corporation of the city of Toronto, and the mayor and other officials of the city from executing a proposed agreement between the city corporation of the first part, the Grand Trunk Railway Company of the second part, and the Canadian Pacific Railway Company of the third part.

August 11, 1890. *Moss*, Q.C., for the plaintiff.

E. D. Armour, Q. C., and *T. Caswell*, for the defendants.

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Judgment. August 16th, 1890. STREET, J. :—

Street, J.

The proposed agreement recites, that the city desires to have the railway bridges now over the lines of the two railways on Dundas Street in the city of Toronto removed and new iron or steel bridges substituted therefor. It then goes on to provide that the city shall build and forever keep up and maintain iron or steel bridges at the point in question : that the Grand Trunk Railway Company shall pay \$11,000 and, the Canadian Pacific Railway Company \$9,000 towards the cost of the construction of the bridges, and shall be forever released from liability with regard to them.

It is not disputed that at present the two railway companies are liable to maintain and keep up bridges at the point in question, sufficient for the requirements of traffic, but they are not bound to build them of any particular material or pattern.

For some years efforts have been made by the city authorities to have improved bridges built by the railway companies in place of the present wooden structures, upon the ground that these are not sufficient for the needs of the traffic, which has increased with the growth of the city to the north-west.

In December, 1887, the question was brought before the Railway Committee of the Privy Council by the city, upon notice to the two railway companies. The committee, after hearing all parties and taking time for consideration, ordered that certain repairs, additions and improvements to the existing bridges should be made by the railway companies, and postponed the question of replacing them by new ones.

The city council since and before that time have had frequently under discussion various schemes and plans for the erection of new bridges at the point in question, the final outcome of which appears to have been the report of the committee on works, adopted by the council on 20th April, 1889, as follows :

"Your committee begs to recommend the adoption of the following report by the city engineer re Dundas Street bridges. 'A petition signed by John Minto, Paul Shakespeare, and others, and certified by the city clerk as being sufficiently signed, is now before the committee asking for the construction of an iron bridge over the tracks of the Grand Trunk and Canadian Pacific railways on Dundas Street, lying between St. Helen's Avenue and Sorauren Avenue. The work is to be carried out as a local improvement, the cost will be approximately \$75,000 (taking the assessment commissioner's valuation of \$25,000 as the amount of damage to land likely to be caused by the construction of the bridges). Of this amount \$20,000 will be paid by the Grand Trunk and Canadian Pacific Companies, and \$30,000 will be paid by the city as its portion of the cost; and the balance, which will be the amount of the damage to land, approximately \$25,000, will be assessed on the several properties described in the petition, which are as follows: Dundas Street on both sides from Sorauren Avenue to Soho Avenue, one third of the cost, approximately \$8,333.33, will be assessed on the several properties on the street within the above-mentioned limits; and the balance, two-thirds of the cost approximately \$16,666.67, will be assessed on the properties abutting on the streets named in the petition (excepting Dundas Street) equally in proportion to the frontage, these properties being equally benefitted by the construction of the bridges. The time over which the payment of the cost shall extend will be, for the cost of the bridge twenty years, and for the rate-payers the value of damage done to the properties will be ten years, the life of the bridge being indefinite.

I only make this recommendation on the distinct understanding that nothing will be done in connection with the construction of the bridge until a full settlement or agreement is made for land damages, if any, and that before any contract is entered into by the city, the city solicitor shall take the necessary proceedings to have it ascertained if any person is entitled to be compensated for lands taken, entered upon, or injuriously affected by this work.'"

On the 15th of July, 1889, the committee on works presented a further report recommending that this report be amended by striking out the whole of the last paragraph from the words: "I only make this recommendation," to the end of the report; and the council, after discussion, adopted the recommendation of the committee, but gave no special reason for doing so, and passed no by-law.

The question next appears to have come up before the Court of Revision, who seem to consider themselves authorized by the action of the council, to proceed to determine, under the general by-law passed by the council applicable

Judgment.
Street, J.

Judgment.
Street, J.

to local improvement cases, what real property would be benefitted by the proposed work, and the proportions in which the assessment of the portion of the cost which was to be borne by the owners of the property benefitted should be distributed amongst them.

On 13th June, 1890, the committee on works presented their report No. 15, to the council, in which they recommend the execution of the agreement with the railway companies mentioned above by which they agree to pay \$20,000, in consideration of being relieved from the duty of building and maintaining the bridges in question.

The report of the committee on works was, in accordance with the course of business in the council where an expenditure of money is involved, referred to the executive committee, who in their report No. 19 dated 11th July, 1890, dealt with the matter as follows:

"Dundas Street Bridges. Your committee again object to the proposed agreement with the railways as to the cost of the Dundas Street bridges, and recommend that the clause in this report relating thereto be struck out, it being considered that another effort should be made to compel the railway companies to erect suitable bridges for the accommodation of the public at this point."

On the 14th July, 1890, the reports of the committee on works and of the executive committee being before the council in committee of the whole, a resolution was carried that the clause of the executive committee's report *re* Dundas Street Bridges be struck out, and that the recommendation of the board of works be adopted. The question was then brought up before the council, and the action of the committee of the whole was sustained by a vote of 22 to 10.

This action was then brought by the plaintiff, a ratepayer, on behalf of all the ratepayers to restrain the execution of the agreement on the part of the city, and an injunction was obtained *ex parte* on the 16th of July, 1890.

During the argument reference was made by counsel on both sides to the expediency of the agreement which is sought to be sustained. With that question, however, I have no concern: my duty is only to ascertain whether the

council have acted in such a manner as to entitle them in point of law to bind the ratepayers of the city to the terms of the proposed agreement. Judgment.
Street, J.

The proposed agreement is one which, if executed, will bind the city to the expenditure of at least \$30,000, for which, it is admitted, that no provision has been made in the estimates for the current year.

The objection made by the plaintiff on this ground is answered by the defendants by pointing to the 1st sub-section of section 621 of the Municipal Act, which authorizes the council in cases coming within the local improvement clauses to borrow from a bank, or otherwise to raise as a temporary loan, the amount required for the work until the actual cost of it shall be ascertained when debentures are to be issued.

Were it not for this provision the corporation would clearly not be entitled to enter into an agreement requiring an expenditure not provided for in the estimates, and the execution of such an agreement should be restrained, as a similarly objectionable agreement was restrained by my brother Robertson, in the Ayr Public School case, a few months ago.

The question must be therefore whether the council here have brought themselves within the Local Improvement clauses of the Municipal Act so as to justify them in agreeing to expend money for which the estimates of the year have not provided.

Under section 618 of the Municipal Act, which is the section upon which the defendants rely, the council are entitled to assume a proportion of the cost of building any bridge on any street where it is expedient and necessary, in their opinion, that the bridge should be built, and when it is inequitable, in their opinion, to charge the whole cost of the work against the lands fronting thereon.

Under this section a council may at any time by a simple majority enter upon works of any magnitude, and may assume on behalf of the city practically their whole cost without any provision being made in the year's estimates, and

Judgment. without any submission to the electors of a by-law authorizing the expenditure. All that is necessary is that they should declare the work to be necessary, and that in their opinion, it is inequitable that the lands fronting on it should be charged with the whole cost of the work, and they must fix the share of the expense which the city is to assume. Having in view the extensive nature of these powers there appears no excuse justifying a council, in the exercise of them, in dispensing with any of the usual formalities prescribed by the Municipal Act, and still less reason for dispensing with any special limitations imposed upon the exercise of these special powers.

Street, J.

By section 282 of the Municipal Act it is provided that "the powers of the council shall be exercised by by-law, when not otherwise authorized or provided for."

I think that the passing of a by-law fixing the amount or proportion of the cost of the work to be assumed by the city, and the proportion to be assessed upon the locality, was the first requisite under section 621 to bringing the proposed expenditure within the local improvement clauses; and I further think it was necessary, in the by-law, to declare the opinion of the council to be that the work was necessary, and that it would be inequitable to charge the whole cost of it upon the locality. They do not appear to be relieved by section 612 from passing a by-law for this purpose: the general by-law applicable to all local improvements which they are there authorized to pass and act upon, and which they have no doubt passed long ago, is limited to providing the means of ascertaining the land to be benefitted and the proportion of the cost to be assessed upon each parcel of that land. Such a general by-law is clearly insufficient for the purposes of section 621 under which the city council has to fix and assume its own proportion of the cost of the proposed work, having in view what it may deem equitable to the local property owners. That is a matter which obviously requires the passing of a special by-law in each particular case, and cannot be determined by the provisions of any general one.

The council here have passed no such special by-law. Judgment.
They have depended entirely upon the simple resolution Street, J.
which they passed adopting the report of the committee on
works. That report may form the foundation for the pre-
paration of the necessary by-law, but does not by any
means answer the purpose of one.

Supposing, however, that the absence of a by-law could be overlooked, there remains the further insuperable difficulty that it cannot with any certainty be gathered from the report of the committee what proportion of the cost of the work is really intended to be cast upon the property to be locally assessed. The language of the report leaves it open to the owners of that property to insist that their proportion is limited to a sum equal to that which may be found payable as compensation to the owners of the property which may be injured by the work, and that the city is to be at the expense of building the bridge, whatever it may cost, assisted only by the \$20,000 to be obtained from the railways. On the other hand it is also true that it leaves it open to the city to insist that the whole cost of everything over \$50,000, which the city and the railways are to provide, is to be borne by the property locally assessed.

The uncertainty in the phraseology of the engineer's report is probably due to the fact that he intended it to be merely preliminary, to be dealt with in a more formal manner so soon as the amount of the damage payable in consequence of the execution of the work, should be ascertained, instead of which the report was adopted as a final one, his precautionary clause being struck out. The deliberation involved in the preparation and submission of a by-law would no doubt have drawn attention to the looseness with which the report was expressed, and would have cleared up the doubt, which must at present exist, as to whether the city at large or the local property owners were to bear any increased cost of the work beyond the estimate.

I come to the conclusion then, for the reasons I have

Judgment. stated and without considering the further objections
Street, J. urged by the plaintiff's counsel, that the city council have not proceeded in a manner to enable them to treat the expenditure as one coming under the local improvement clauses, and that they should be restrained from executing an agreement binding them to an expenditure for which they have no money in hand, and to meet which they cannot lawfully borrow.

The injunction will be continued to the hearing when the costs of the motion will be disposed of.

[COMMON PLEAS DIVISION.]

JANE SCRIBNER V. ROBERT M. PARCELLS, RICHARD
PARCELLS, CAMPBELL W. SAWERS AND PETER
BUCHANAN.

Solicitor—Action brought without proper authority—Costs ordered to be paid by solicitor.

An action, brought by solicitors in the plaintiff's name, was dismissed with costs, and judgment entered against the plaintiff. The solicitors had acted without any written retainer from the plaintiff, or any instructions from her personally, relying on instructions received from plaintiff's husband, which she positively denied ever having given, and also on letters written to her, the sending of which was not strictly proved, and which she denied ever having received.

On a motion made therefor by the plaintiff the judgment and all subsequent proceedings were set aside, and the solicitor ordered to pay the plaintiff's costs as between solicitor and client, and the defendant's costs as between party and party.

Statement.

THIS action was commenced on the 13th July, 1886, alleging a conveyance of certain land by the defendant Robert M. Parcels to the plaintiff by deed, dated 27th July, 1885, the non-registry thereof by an oversight, the conveyance of the same land by the defendant Robert M. Parcels to the defendant Richard Parcels by deed, dated the 12th November, 1885, and registered the 13th November, 1885, the conveyance of the same land by the defendant

Richard Parcels to the defendant Campbell W. Sawers by ^{Statement.} deed dated the 22nd December, 1885, and registered on the 23rd December, 1885, the reconveyance of the same land by the defendant Campbell W. Sawers to the defendant Richard Parcels by deed, dated the 24th April, 1886, and registered on the 24th April, 1886, and the conveyance of the same land by the defendant Richard Parcels to the defendant Peter Buchanan by deed, dated 24th April, 1886, and registered the 24th April, 1886, and alleging that all the said registered conveyances were made for merely nominal considerations and with full knowledge of the plaintiff's claim to the said land, and seeking to have the said registered conveyances set aside as fraudulent and void, and delivered up to be cancelled, and the registration thereof vacated as clouds upon the plaintiff's title, and other relief.

The statement of claim was delivered on the 18th October, 1886; the statement of defence on the 28th October, 1886, and the replication on the 9th November, 1886.

The cause was entered for trial at the winter sittings of the High Court at Toronto, on the 6th January, 1887, and was on the 17th January, 1887, postponed to the next sittings by an order in Chambers. On the 17th March, 1887, the cause came on for trial at the spring sittings at Toronto; and, the plaintiff not being ready to proceed, judgment was given dismissing the action with costs. A motion was subsequently made to the Divisional Court to set aside the said judgment, which motion was dismissed with costs.

The plaintiff, on the 2nd December, 1890, moved to set aside the judgment, and all subsequent proceedings on the grounds that she never authorized the bringing of the action, but that the same was brought without her authority or permission: that she never consented to nor approved of the bringing of the same, nor did she authorize or consent to the prosecution thereof; and that she never

Statement. had any knowledge of the same having been brought or continued in her name or otherwise.

December 2, 1890. *C. J. Holman*, supported the motion.

J. A. McDonald, showed cause for the plaintiff's solicitors of record in the action; and *Masten* for the defendants.

The plaintiff in her affidavit, filed in support of the motion, swore that she never authorized the bringing of the action; nor was she ever asked to allow it to be brought in her name; nor did she ever know, nor did she have any reason to suspect, that such had been done: that she never had any knowledge of the transactions out of which the suit arose, nor did she ever have any interest in the subject matter of the suit: that she had never heard of the deed from Parcells to her, and never authorized or empowered her husband, or any other person, to take such deed in her name: that she never at any time ratified, nor in any way approved of or consented to, the said transaction, nor the bringing of the suit; but immediately upon hearing of it, employed a solicitor to institute proceedings to set aside the judgment: that she never received any letter from the plaintiff's solicitors of record, nor from any other source concerning the case: that any letter written by them to her, must have been obtained from the post-office by her husband without her knowledge, and its contents were never communicated to her; and that she never heard of any such letter; that she did not know the plaintiff's solicitors of record, and never had any business with them directly or indirectly; and never had any correspondence with them on any subject, nor concerning any matter whatever.

Mr. Fullerton, one of the plaintiff's solicitors of record in this action, filed his affidavit in answer in which he swore that he was instructed by J. M. Scribner, the husband of the plaintiff, to bring the action for the plaintiff, the said J. M. Scribner, representing to him that he had the authority and assent of the plaintiff to give such in-

struction and to institute the action; and that during the *Argument*. course of the said action he wrote two letters to the plaintiff, copies of which he produced: that he verily believed that said letters were posted in the ordinary course of business: that the said letters were never returned from the dead letter office as he verily believed. One of these letters was dated 1st January, 1887, and the other 12th February, 1887, and each called for an immediate answer.

The deposition of the plaintiff's husband was also filed in answer, in which he swore that the action was brought with his wife's knowledge, and that she knew it was brought in her name, and did not object to its being so brought: that she knew out of what it arose and that she knew of the action during its progress.

The plaintiff in reply filed her affidavit in which she swore that it was untrue that her husband ever told her that he was bringing an action in her name, or that he had done so, or that she ever knew that he was going to trial in any action in which she was plaintiff; and she denied most positively that she knew the action was going on; that she had heard read the letters referred to in the affidavit of Mr. Fullerton, and that she never received them.

The plaintiff also filed several affidavits of persons who swore that they would not believe her husband upon oath.

It appeared upon the depositions that the plaintiff and her husband had not lived happily together, and that from June, 1887, he had not lived with her at all.

December 6, 1890. ARMOUR, C. J.:—

The plaintiff's solicitors of record never had any written retainer from the plaintiff, nor any instructions whatever from her personally to institute or carry on this action. They received their instructions to institute and carry it on solely from her husband, and they have now to rely for proof of her authority upon her husband's deposition, which is positively denied by her, and upon the letters, the sending of which is not strictly proved, and the receipt of which by the plaintiff is positively denied.

Judgment. In *Wright v. Castle*, 3 Mer. 12, the Chancellor, Lord Eldon, said: "There can be no doubt as to the course of this Court's jurisdiction; that, if a solicitor files a bill in the name of his client, without having authority from him for so doing, then, if the plaintiff wishes to have the bill dismissed, it will be so ordered, and the solicitor will be made to reimburse him all the expenses occasioned by its having been filed. It is also settled, that if the plaintiff denies and the solicitor asserts, authority to have been given, and there is nothing but assertion against assertion, the Court will say that the solicitor ought to have secured himself by having an authority in writing, and that, not having done so, he must abide the consequences of his neglect. There must be a special authority to institute, although a general authority is sufficient to enable the solicitor to defend a suit. In this case, the plaintiff has positively sworn that he gave no authority whatever to file the bill, and this is met by only a general assertion of his being authorized on the part of the solicitor."

See also *Wilson v. Bailey*, 1 J. & W. 457; *Wade v. Stanley*, 1 J. & W. 674; *Dundas v. Dutens*, 2 Cox Ch. Cas. 235.

In *Owen v. Ord*, 3 C. & P. 349, Lord Tenterden said: "I think it right to state, that every respectable attorney ought, before he brings an action, to take a written direction from his client for commencing it; and he ought to do this both for his own sake and for the sake of his client. It is much better for him, because it gets rid of all difficulty about proving his retainer; and it would also be better for a great many clients, as it would put them on their guard, and prevent them being drawn into law suits without their own express direction."

In *Lord v. Kellett*, 2 M. & K. 1, the Chancellor, Lord Brougham, said: "It was true that a solicitor must, for the purpose of instituting a suit, receive specific authority from his client; but it had never been decided that such authority might not be by parol. The rule now contended for—that wherever the plaintiff denied the fact of the retainer, the

solicitor was bound to produce an authority in writing—
 was not a fair inference from the language of Lord Eldon; Judgment.
 much less was it established by the cases referred to * * Armour, C.J.
 That the authority for filing a bill might be by parol as
 well as in writing, and that, in the former case, it might be
 proved by circumstances and by the subsequent conduct
 of the party."

In *Tabbernor v. Tabbernor*, 2 Keen 679, the Master of the Rolls, Lord Langdale, said, at p. 680: "According to the strict practice, there ought to be a warrant in writing to authorize the solicitor to commence proceedings; it is sometimes, however, dispensed with, at the peril of the solicitor; had the party here acquiesced, it would be another question."

In *Wiggins v. Peppin*, 2 Beav. 403, the Master of the Rolls, said, at p. 404: "I believe it has been decided more than once, that it is not necessary that an authority given to a solicitor, should be in writing; further, it has been said—that it is the duty of the solicitor to take care that he has sufficient evidence of the authority; and if he neglects the precaution of obtaining it in writing, and his authority is afterwards challenged, he will, for want of written evidence, be treated as if he had no authority at all; I think the cases go to that length."

On a subsequent day, he said, at p. 405: "I have looked at the authorities, and they entirely bear out the opinion I expressed the other day, that if an authority be not given in writing, and the authority is denied, and there is nothing but assertion against assertion, the solicitor must bear the costs of the risk he thus undertakes; at the same time there may be subsequent conduct, from which an acquiescence may be inferred, and that will make a difference."

See *Martindale v. Lawson*, 1 Cooper, 85.

In *Hood v. Phillips*, 6 Beav. 176, the Master of the Rolls said: "Before filing a bill, it is the duty of a solicitor to obtain distinct authority; the general rule is that he ought to have it in writing, but though this is the proper course, still it is

Judgment. not necessary, if it be proved that the plaintiff has afterwards acquiesced in the proceedings, and that the circumstances are such that the Court can infer an authority. Whenever the question arises, whether the authority has been given or not, and it becomes the subject of doubt and argument, the onus of proving it, lies on the solicitor."

In *Allen v. Bone*, 4 Beav. 493, the Master of the Rolls said: "It is the duty of a solicitor to obtain a written authority from his client before he commences a suit. If the circumstances are urgent, and he is obliged to commence proceedings without such authority, he should obtain it as soon afterwards as he can. An authority may however be implied where the client acquiesces in and adopts the proceedings; but if the solicitor's authority is disputed, it is for him to prove it, and if he has no written authority, and there is nothing but assertion against assertion, the Court will treat him as unauthorized, and he must abide by the consequences of his neglect."

In *Marie v. Marie*, 23 L. J. N. S. Ch. 154, Wood, V. C., said: "He should have felt great hesitation in deciding the case upon the conflicting statements in the affidavits, if the onus had lain upon the plaintiff seeking to have his name removed, to prove that he had given no authority. But the onus lay upon the solicitor, who, it had been decided, must obtain a written authority from his client to institute proceedings. Subsequent acquiescence in proceedings originally taken without authority might be sufficient, but such a case had not been made out here. Great suspicion had been thrown upon the case, but the solicitor had failed in proving acquiescence." See *Atkinson v. Abbott*, 3 Dr. 251; *Beddy v. Smith*, 8 Ir. Eq. R. 667, (1846); *Shaw v. Ormiston*, 2 P. R. 152; *Henderson v. McMahon*, 12 U. C. R. 288; *Re Savage*, 15 Ch. D. 557; *Schjott v. Schjott*, 19 Ch. D. 94; *Wray v. Kemp*, 26 Ch. D. 169.

The principles established by these decisions, apply equally to cases where, as in the present case, the solicitor receives his instructions from a third person assuming to act for the plaintiff.

In *Pinner v. Knights*, 6 Beav. 174, G., a solicitor, had filed a bill in the name of Thomas Knights and others. It appeared, however, that he had had no communication with Thomas Knights, and had received no authority from him personally to institute the suit, but had acted by the directions of Thomas Knights' brothers, who said that they had communicated with him, and that he had authorized the step. It was moved that Thomas Knights' name might be struck out with costs to be paid by the solicitor. Affidavits were filed in support and in opposition to the motion by Thomas Knights and by his brothers, which appeared to the Court to leave the fact of the plaintiff's authority to his brothers in considerable doubt.

The Master of the Rolls said, at p. 175: "Nothing surprises me more than that solicitors should so frequently take upon themselves to file bills in the names of persons who have not given them authority in writing. The general rule of the Court is, that a solicitor should obtain a written authority from his client; I have often had occasion to observe, that the interest of the client does very often, induce a solicitor to file a bill before he has had an opportunity of obtaining an authority in writing; I cannot consider a solicitor to blame in cases of that kind, but, as I have said before, he acts most imprudently if he does not take the very first opportunity to obtain the sanction of his client for what he has done. The law of the Court is perfectly clear, that if the authority afterwards comes into question, aye or no, whether there is an authority from the client or not, and there is no writing, it will go against the solicitor unless he can prove distinct authority or implied authority by acquiescence or some other means. Now, in this case there does not appear to have been any personal communication between Mr. G. and Mr. Thomas Knights; Mr. G. trusted to the representations of the brothers, who said they had communicated with Mr. Thomas Knights, and that he had authorized them to instruct him. The consequence is, that Mr. G. must prove satisfactorily, that

Judgment. the brothers were empowered to authorize him. When we
Armour, C.J. come to examine the evidence, it is impossible for the Court to make out on which side the truth lies, and upon that ground, and upon that ground alone, I am under the necessity of saying that the solicitor, on whom the burthen of proof is cast, has not, in the midst of this conflicting and contradictory evidence, made out his case."

In *Re Gray*, 20 L. T. N. S. 730, where the solicitor had filed a bill in the name of a person upon instructions given by a third person assuming to act for him, Lord Romilly said, at p.732: "The extent of a retainer is not unfrequently discussed on taxation, but the fact of a bill being filed in the absence of any retainer, I do not remember to have met with before. If it were necessary to investigate the existence of an authority to file the bill before the suit could proceed, irreparable injury might arise in a variety of cases. It is therefore the duty of every solicitor to make himself certain on this point. Lord Langdale was of opinion that no bill ought to be filed without a written retainer, but unquestionably if it be not a written retainer, there must be an authority to institute the suit communicated expressly by the client to the solicitor without any intermediate agency.

See *Hall v. Bennett*, 2 Sim. & Stu. 78.

Upon these authorities, it is impossible for me to hold that the plaintiff's solicitors of record have satisfied the onus which is cast upon them of proving the authority of the plaintiff to institute and carry on this suit. I am not satisfied that the husband ever had any authority, either express or implied, from his wife to institute or carry it on, and the letters written by the plaintiff's solicitors of record to the plaintiff, even if received by her, which I think unlikely, afford but little if any evidence of acquiescence on her part.

See *Hall v. Laver*, 1 Hare 571; *Re Manby*, 26 L. J. N. S. Ch. 313.

I have no doubt that the plaintiff's solicitors acted in perfect good faith, but reposing too great confidence in the

plaintiff's husband, they neglected to take proper precautions for their own protection and must now suffer the consequences. Judgment.
Armour, C.J.

The order will be that all the proceedings in this action be set aside, and that the plaintiff's solicitors of record shall pay the costs of the defendants between party and party, and the costs of the plaintiff, between solicitor and client, according to the minutes of the order in *Nurse v. Durnford*, 13 Ch. D. 764.

[COMMON PLEAS DIVISION.]

CLARKE V. MACDONELL.

Limitations of actions—Surrogate guardian—Infant—Power to lease lands of—Possession before and after majority of infant.

A guardian of an infant appointed under the Surrogate Court Act, R.S.O. ch. 137, has power to lease the lands of the infant during the latter's minority, but not beyond that period.

Switzer v. McMillan, 23 Gr. 538, not followed.

Decision of ARMOUR, C.J., affirmed on this point.

During such minority the guardian is a trustee of the lands for the infant and cannot acquire a title to them by possession, but after the majority of the infant the possession of the guardian changes its character and becomes that of a stranger, and the Statute of Limitations runs in favour of the guardian or those claiming under him.

Hickey v. Storer, 11 O. R. 106, followed.

Decision of ARMOUR, C.J., reversed on this point.

Statement.

THIS was a case tried before ARMOUR, C.J., without a jury, at Picton, at the Spring Assizes of 1890.

The action was brought to establish the title of the plaintiffs to, and to recover possession of, lot number one on the corner of Main and King streets, in the village of Milford, in the county of Prince Edward.

The plaintiffs were the daughters of David Kelly, who was the devisee of the land in question under the will of his father Johnston Kelly, bearing date the 13th day of May, 1853, as follows :

"I give and devise to my son David all my real and personal estate; to have and to hold, to him, his heirs and assigns forever, on condition that he shall pay each of the rest of my children the aforesaid sum of twenty-five pounds; and I charge all my estate, real and personal, with the payment of the said sum of twenty-five pounds to each of my children. Provided, nevertheless, and my will is, that my son David shall have to his own use and benefit my real estate only during his natural life; and the said real estate descend to and become vested in his oldest son during the term of his natural life, and so on *ad infinitum*."

Johnston Kelly died on the 25th March, 1857, and probate of his will was granted on the 11th January, 1858

Letters of guardianship were issued to Mary Kelly, his widow, as guardian to David Kelly.

David Kelly came of age on the 24th July, 1866, and Statement. died on the 7th June, 1868.

The defence was that the devise in the will was subject to the conditions therein which were in the nature of conditions precedent to David Kelly's taking under the devise; and which conditions were never performed as he did not enter into possession or occupation of the land, but on the contrary repudiated the devise and disclaimed all interest in the land.

And also that if any interest passed to David Kelly by the will he was tenant in tail male only; and that, having no male issue him surviving, the lands reverted to the heirs-at-law of Johnston Kelly; and that the heirs-at-law of Johnston Kelly (with the exception of the said David Kelly) conveyed the land to parties through whom the defendants claimed title: that the action was not brought within twenty years from the time the plaintiffs' right of action first accrued, and was barred by the Statute of Limitations.

The defendant Macdonell claimed title as purchaser at sheriff's sale under a writ of *ven. ex.* against one Walter Ruttan, who had purchased the property from the heirs of Johnston Kelly.

A further defence was that the widow of Johnston Kelly proved the will, and that she was obliged to sell and dispose of the lands for the purpose of paying off the debts and claims against the estate, and after such payment there was no balance left to go to the said David Kelly.

It was also alleged by the defendants Alexander Daniel and Robert Azar Knox and Sarah E. Knox, that the grantors through whom they claimed as well as themselves made lasting improvements on the land under the belief that the said land was their own; and they asked, in the event of the Court holding that the plaintiffs were entitled to succeed, that it be declared that the said defendants had a lien on the lands to the amount to which the same had been enhanced by such improvements.

The defendants Sarah E. Knox and The Landed Bank-

Statement. ing and Loan Co. were the mortgagees of the several portions of said lands claimed to be owned by the other defendants.

The allegation in the statement of claim was that under the terms of the will David took an estate in fee simple in the land, and the plaintiffs as his heiresses-at-law claimed title thereto.

After the death of Johnston Kelly his widow Mary Kelly rented the property to different tenants receiving the rent therefor; and, in June, 1866, Harvey Empey became tenant thereof under an agreement by which he was to pay \$60 a year rent, to be expended in repairing the premises, which were at that time in a very dilapidated condition. He remained as tenant over five years, giving up possession in July or August, 1871, to Mary Wellbanks, formerly Mary Kelly.

It did not appear from the evidence whether Empey was a yearly tenant, or whether his tenancy was for five years from his entrance into possession.

At the time Mary Kelly undertook to lease to Empey David Kelly was within two months of attaining his majority; and Empey, prior to renting, spoke to David Kelly, saying he was about renting the place; and David replied, "I wish you would; I want her (his mother) to get out of it, and whatever you do with her is all right." He (David) likewise told Empey he would have nothing to do with it, saying, "Whatever you and mother do I am satisfied."

The learned Chief Justice delivered the following judgment:

May 10, 1890. ARMOUR, C. J. :—

It was held by Vankoughnet, C., in *Townsley v. Neil*, 10 Gr. 72, that a guardian of an infant appointed by the court of chancery had no authority to make a lease of the infant's real estate without the sanction of that court; and that a lease made by such guardian without such sanction was void *ab initio*.

The guardian of the infant in this case was appointed by the Surrogate Court under the provisions of the Act 8 Geo. IV. ch. 6, now R. S. O. ch. 137. Judgment.
Armour, C.J.

This Act provided, among other things, that the guardian so appointed should have "the charge and management" of the infant's estate real and personal.

Strong, V. C., in *Whitney v. Leyden (a)*, determined that a guardian so appointed had no power to lease without the sanction of the Court; but whether by reason of the Act 12 Vict. ch. 72, or by what other reason is not stated.

This case was followed by Blake, V. C., in *Smith v. Smith*, and again by Proudfoot, V. C., in *Switzer v. McMillan*, 23 Gr. 538.

I would have been of the opinion, but for these decisions, that a guardian so appointed to whom was committed the charge and management of the infant's estate real and personal during the minority of such infant, would undoubtedly possess the power to make leases of the infant's real estate during such minority.

It may be said, I think it would likely be that a Divisional Court would decline to follow these decisions, especially after the decision of *Huggins v. Law*, 14 A. R. 383. I am told that Chief Justice Sir Adam Wilson dissented from these decisions; but I have been unable to lay my hands upon the case in which he is said to have so dissented.

Mary Kelly was, however, duly appointed guardian of her infant son David Kelly; and, as such, took the charge and management of the lands in question. The said David Kelly was born on the 24th July, 1845, and attained his majority on the 24th July, 1866, and died on the 7th day of June, 1868.

I find that Mary Kelly, as such guardian of David Kelly, in the month of June, 1866, and during the minority of the said David Kelly, leased the said lands to Henry Empey for \$60 a year, to be laid out in repairs on the said lands, and that Henry Empey held the said lands under the said lease until July or August, 1871,

(a) Not reported, but referred to in *Switzer v. McMillan*.

Judgment when he gave up possession thereof to the said Mary Armour, C.J. Kelly.

It was contended that the Statute of Limitations began to run against David Kelly immediately upon his attaining his majority; but I do not think so. He was, and continued to be in possession of the lands in question until his death, for his guardian's possession was his possession, and his guardian was no more than a caretaker for him, and although her authority as guardian ceased when he attained his majority, yet, as she was in possession as his guardian at the time he attained his majority, she must be taken to have continued in possession in the same character unless something was done to change the character of her possession; and no such change was proved; and her possession continued to be his possession as it was before he attained his majority.

I refer to *Re Taylor*, 28 Gr. 640, which is distinguishable, for there it was a *stranger*, here it was *the mother and the duly appointed guardian*; *Thomas v. Thomas*, 2 K. & J. 79; *Wall v. Stanwick*, 34 Ch. D. 763; *Mathew v. Brise*, 14 Beav. 341; *Re Hobbs*, 36 Ch. D. 553.

Whether David Kelly took an estate for life or an estate tail is immaterial for the purpose of this controversy, for he died without issue; and I think it clear that he did not take an estate in fee.

The plaintiffs are entitled, in my opinion, as heirs-at-law of Johnston Kelly to one undivided seventh part of the lands in question.

The defendants moved on notice to set aside the judgment entered for the plaintiffs and to enter judgment for the defendants.

In Easter Sittings, June 4th, 1890, *Watson*, Q. C., supported the motion before a Divisional Court composed of GALT, C.J., and MACMAHON, J.

The devise to David Kelly was on a condition which was never performed, and therefore the land reverted

to the heirs of Johnston Kelly, and the heirs of John-Argument.
ston Kelly, with the exception of those of David Kelly, have conveyed to the parties through whom the defendants claim title: *Wall v. Stanwick*, 34 Ch. D. 763; *Doe d. McIntyre v. McIntyre*, 7 U. C. R. 156; *Re Cleator*, 10 O. R. 326; *Little v. Billings*, 27 Gr. 353; *Parker v. Baxter*, 1 K. & J. 156. The lease made by Mary Kelly during the infancy of David Kelly, was void *ab initio*; at all events, it terminated on David Kelly attaining his majority, and certainly on his death. There was twenty years' possession in Mary Kelly, and those claiming under her after David Kelly's death. The possession of Mary Kelly was then her own absolute possession, and a good statutory bar was created: *Hickey v. Stover*, 11 O. R. 106; *Townsley v. Neil*, 10 Gr. 72; *Switzer v. McMillan*, 23 Gr. 538; *Simpson on Infants*, 2nd ed., 367; *Wood v. Patteson*, 10 Beav. 541; 2 *Daniel's Chancery Practice*, 6th ed., 1130; 1 *Holmsted's Rules*, 319, 323. At all events the defendants can set up a lien for the improvements made under a *bonâ fide* belief of title: *McGregor v. McGregor*, 5 O. R. 617; *Shanagan v. Shanagan*, 7 O. R. 209, 213.

Alcorn, contra. The devise to David Kelly, was a devise in fee. The subsequent devise was void for repugnancy; and also as being in contravention of the rule against perpetuities: *Jarman on Wills*, 4th ed., p. 479; *Doe d. Herbert v. Thomas*, 3 A. & E. 123. The lease made by Mary Kelly, was a good and valid lease. She was the guardian of David Kelly during his infancy; and since the decision of *Huggins v. Law*, 14 A. R. 383, it must be held that a lease by such guardian is good; and during the continuance of the lease, if not up to the time she conveyed to Ruttan, she never altered the position in which she held; and therefore the statutory period has not elapsed: *Lewin on Trusts*, Black ed., 398, 406, 1058; *Sleeman v. Wilson*, L. R. 13 Eq. 41; *McArthur v. Egleson*, 3 A. R. 577; *Re Taylor*, 28 Gr. 640; 8 Geo. IV. ch. 6; R. S. O. ch. 137, sec. 12, sub-sec. 3. Under the circumstances there can be no lien for improvements: *Munsie v. Lindsay*, 11 O. R. 520.

Judgment. January 5, 1891. MACMAHON, J.:—

MacMahon,
J.

The learned Chief Justice held that David did not take the fee under the will, and, as he had no son, he could not take as tenant in tail male, and the plaintiffs were permitted to claim as heirs-at-law of Johnston Kelly.

The learned Chief Justice in his judgment expresses the opinion that since the decision in *Huggins v. Law*, 14 A. R. 383, a Divisional Court would decline to follow the judgments of Vice Chancellor Strong in *Whitney v. Leyden*, (not reported but referred to in *Switzer v. McMillan*, 23 Gr. 538), and that of Proudfoot, J., in *Switzer v. McMillan* in holding that a guardian appointed by the Surrogate Court had no power to lease the infant's lands.

I entirely concur in the opinion thus expressed, that being in consonance with the view as to the authority given to a guardian appointed under our Surrogate Court Act (R. S. O. ch. 137) enunciated by Patterson, J. A., in *Huggins v. Law*, pp. 395 to 399.

But the guardian would have no authority to lease the real estate for a term extending beyond the minority of the infant.

The learned Chief Justice held that whether Mary Kelly as statutory guardian of her son David Kelly had a right to lease the property or not, she took the charge and management of the lands, and that her possession was his possession until his death, for she as his guardian was no more than a caretaker for him, and although her authority as guardian ceased when he attained his majority, yet, as she was in possession at the time he attained his majority she must be taken to have continued in possession in the same character, unless something was done to change the character of her possession, and her possession continued to be his possession as it was before he attained his majority.

Admitting that the mother was caretaker of the property for David up to the time of his death on the 7th of June, 1868, I do not consider she can be regarded as being

in possession after David's death as caretaker for his children, the present plaintiffs.

Judgment.

MacMahon,
J.

While Mary Kelly was in possession as statutory guardian of her son David she was a trustee for him, which continued until David reached his majority. After that, and until his death, if a caretaker or trustee, she was merely a constructive trustee standing in the like position as a stranger, and therefore not prevented from claiming the benefit of the statute: *Beckford v. Wade*, 17 Ves. 87; *Hovenden v. Lord Annesley*, 2 Sc. & L. 607, 617, cited in *Re Taylor*, 28 Gr. 640, at p. 642.

Blake, V. C., in his judgment in the latter case, at p. 646, refers to *Petre v. Petre*, 1 Dr. 371, saying that: "Vice-Chancellor Kindersley * * thus explains what an express trust under the Act is: 'The 25th section is also confined to express trusts, that is trusts expressly declared by a deed, or will, or some other written instrument;' it does not mean a trust that is to be made out by circumstances; the trustee must be expressly appointed by some written instrument; and the effect is, that a person who is under some instrument an express trustee, or who derives title under such a trustee, is precluded, how long soever he may have been in the enjoyment of the property, from setting up the statute. But, if a person has been in possession, not being a trustee under some instrument, but still being in possession under such circumstances that the Court, on the principles of equity, would hold him a trustee, then the 25th section of the statute does not apply; and if the possession of such a constructive trustee has continued for more than twenty years, he may set up the statute against the party who, but for lapse of time, would be the right owner.' At p. 749 Mr. Lewin states the rule to the same effect: 'But trusts arising by the construction of a court of equity from the acts of parties, or to be made out by circumstances, or to be proved by evidence, will not be saved by the clause relating to express trusts.'"

Section 30 of Ontario Limitation Act, R. S. O. ch. 111,
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Judgment. is a transcript of section 25 of 3 & 4 Wm. IV. ch. 70,
MacMahon, J. referred to in the above paragraph from the judgment of Kindersley, V. C. And under R. S. O. ch. 137, sec. 18, sub-sec. 3, where a guardian to an infant is appointed by the Surrogate Court, such guardian "shall have the charge and management of his or her estate real and personal," etc., which is in effect the creation of an express trust for the purposes mentioned during the infant's minority, as if the express trusts had been "declared by deed or will or some other written instrument."

It was held in *Hickey v. Stover*, 11 O. R. 106, that where the mother had been appointed by the Surrogate Court guardian of her son, she thereby became express trustee during his minority, so that she could not acquire title against him by possession of his lands, yet the guardianship ended and the trust ceased with the son's minority; and, as the mother dealt with the land in question as her own for some twenty-two years, she had acquired a good title to it by possession as against the son. See also *Re Taylor*, 28 Gr. 640, and the judgment of the Court of Appeal in *Heward v. O'Donohue* (not reported).

After reaching his majority David never attempted to take possession, and from what he told Empey prior to the latter's leasing the land, he did not want to have anything to do with the property. The mother appears to have dealt with the land as her own, for Empey gave up possession to her in 1871, and she then leased it to Walter Ruttan for two years at \$100 a year, to be expended in repairs. Before the two years had elapsed,—namely in December, 1872—Ruttan procured from the widow and from five of the heirs of Johnston Kelly quit claim deeds of their interests. Mrs. Temple, another of the heirs and her husband having quit claimed to Nelson Dodge, Dodge gave to Walter Ruttan a quit claim of the interest derived from Mrs. Temple; and in consideration of receiving this interest from Dodge, Ruttan conveyed to Dodge a portion of lot 38 namely the 40 feet now claimed by Robert E. Knox, subject to a mortgage thereon for \$600 given by him to the defendant Sarah E. Knox.

Since writing the above my attention has been drawn to the case of *Lyell v. Kennedy*, 14 App. Cas. 437. In that case, however, the defendant had received the rents as agent for the heir, and therefore could not dispossess the heir so as to put him to his action under secs. 2 and 3 or sec. 8, of 3 & 4 Wm. IV. ch. 27, because having received the rents as agent for the heirs they were always in possession of the land; and that as to the accumulated rents and profits the defendant had made himself a trustee by receiving the rents in his former capacity as executor of the estate and giving receipts for such rents under the title of "the executors of Lawrence Buchan," and paying the rents into a separate ear-marked account in his own bank.

Judgment.
MacMahon,
J.

The position of Mary Kelly in the present case was totally different from that of the defendant in *Lyell v. Kennedy*. Upon David Kelly reaching his majority and the mother ceasing to be guardian, she was, as stated by Boyd, C., in *Hickey v. Stover*, 11 O. R. 106, at p. 116, "in possession of the land as a stranger," and the statute then commenced to run as against the son.

As stated in *Hickey v. Stover*, at p. 116, the point really decided in *Thomas v. Thomas*, 2 K. & J. 79, to which we were referred during the argument, is, that when a father enters upon land of his infant children, the Statute of Limitations does not begin to run against the children until they attain twenty-one years; and from that time, at least, a child has twenty years within which he may recover possession. This is in favour of the defendants' contention herein.

There was judgment at the trial in favour of the plaintiffs for an undivided one-seventh part of the lands in question, the learned Chief Justice holding that they were entitled thereto as heirs-at-law of Johnston Kelly.

For the reasons stated the motion must be absolute to set aside the judgment directed to be entered for the plaintiffs, and to enter a judgment for the defendants with costs.

The cross-motion of the plaintiffs is also dismissed with costs.

GALT, C. J., concurred.

See *Kent v. Kent*, ante p. 445.

[COMMON PLEAS DIVISION.]

THE QUEEN V. ATTWOOD.

*Criminal law—Indictment for offering to purchase counterfeit notes—
Evidence shewing notes to be genuine, though believed by prisoner to be
counterfeit.*

A person indicted for offering to purchase counterfeit tokens of value cannot be convicted on evidence shewing that the notes which he offered to purchase were not counterfeit, but genuine bank notes unsigned, though he believed them to be counterfeit and offered to purchase under such belief. [GALT, C.J., dissenting].

In the course of a conversation between the prisoner and a detective relative to the purchase of counterfeit money, the prisoner asked the detective whether he had received a letter written by the former stating his desire to purchase counterfeit money; and upon the detective shewing prisoner the letter he admitted it was his:—

Held, that the letter was admissible as in a sense forming part of the subject matter of the conversation.

Statement.

THE prisoner was tried before GALT, C. J., and a jury, for offering to purchase counterfeit tokens of value under 51 Vict. ch. 40 (D.)

The charge on which he was convicted was that he offered to accept and take possession of what purported to be certain counterfeit tokens of value.

The notes which were shewed to him as counterfeit, and which he offered to purchase, were genuine notes of the Canadian Bank of Commerce, unsigned, he believing them to be counterfeit.

For the prisoner it was contended that, inasmuch as the notes were not counterfeit, there was no case to go to the jury.

The learned Chief Justice overruled the objection, and the prisoner was convicted.

The learned Chief Justice reserved for the opinion of the Court the question whether, admitting that the notes were genuine, the prisoner could be convicted. The admissibility in evidence of a letter written by the prisoner to a detective was also reserved. The facts as to which, as well as the contents of the letter, are mentioned in the judgments.

In Michaelmas Sittings, November 19, 1890, the case was Argument. argued before GALT, C. J., and ROSE and MACMAHON, JJ.

Osler, Q. C., for the prisoner. The evidence no doubt shews that there was an intent to purchase counterfeit money, but which was not in existence. It is not sufficient merely to shew intent, but you must shew something on which the intent can operate. If the parties met together and discussed the matter of entering into an arrangement to purchase counterfeit money, but no existing money was mentioned, and no arrangement entered into with respect to anything in esse, then there is no offence committed under the section under which the indictment is laid. The agreement to purchase genuine money under the belief that it is counterfeit, constitutes no offence under the section. The next point is that the letter admitted in evidence in proof of the alleged offence should not have been admitted. It is not evidence of the intent to purchase. It might be evidence of the intent to pass counterfeit money, but that is not the offence charged here.

J. R. Cartwright, Q. C., for the Crown. The offence aimed at by the section is not only for purchasing counterfeit money, but "what purports so to be." Some force must be given to these latter words; and the intention of the Legislature evidently was to cover just such a case as the present, otherwise there would be no force in the words "what purports so to be." In criminal offences it is the evil intent that constitutes the crime. As to the meaning of the word "purport:" *Dicker v. Angerstein*, 3 Ch. D. 600. The letter was clearly admissible as shewing an intention to purchase counterfeit tokens of value.

January 5, 1891. GALT, C. J. :—

There is no dispute of fact in this case. The evidence established the charge; but I reserved for the consideration of the Court the question whether, admitting the notes to be genuine, the prisoner could be convicted.

The statute, so far as relates to this question, is as fol-

Judgment. lows: "And every one who purchases, exchanges, accepts, takes possession of, or in any way uses, or offers to purchase, exchange, accept, take possession of, or in any way use any such counterfeit token of value, or *what purports so to be*, is guilty of felony."

Galt, C.J.

In all criminal offences it is the evil intent that constitutes the crime, and that such rule was intended by the Legislature to apply to the present case is apparent from the using the words "counterfeit tokens of value or what purports so to be. If the instrument was counterfeit there could be no "purporting," because it was so; and, therefore, if a person to whom tokens of value were offered as counterfeit, and he, believing them to be so, offered to purchase them, he comes within the clause, for, so far as he was concerned, although they were genuine, they, through the representation made to him, "purported" to be counterfeit.

It is manifest from the nature of the crime that, so far from the token of value being counterfeit on its face, the object of the criminal would be to make it appear as genuine.

Objection was taken to the receipt of a letter written by the prisoner to one Young, on the ground that its contents had no bearing on what took place in Toronto which led to the arrest of the prisoner. The letter was written by the prisoner, and most clearly proves what his intention was when he went to meet "Young" at the Rossin House. It was not only admissible, but, as far as the criminal intention of the prisoner was concerned, is conclusive.

ROSE, J. :—

The case reserved for our opinion is, whether a party indicted "for offering to purchase counterfeit tokens of value," can be convicted on evidence that he offered to purchase notes which "were not counterfeit although the prisoner believed them to be so, and offered to purchase them under that belief."

Upon the best consideration that I have been able to

give to the case, and the arguments of counsel, it seems to me that the question contains its own answer. If the question were answered in the affirmative, then the belief of the prisoner would change notes not counterfeit into counterfeit notes.

Judgment.
Rose, J.

The notes were either counterfeit or not. If counterfeit, then he might well be convicted of offering to purchase counterfeit tokens of value—but the case states that they were not counterfeit, and therefore there was no evidence of any offer to purchase counterfeit tokens of value. It may be that an offence of a different character was committed; but no case has been submitted to us for an opinion on any such charge.

The evidence was made part of the case; but, so far as this question is concerned, all we learn is that the notes were unsigned notes of the Bank of Commerce, which the case states were not counterfeit.

Mr. Osler objected that evidence of what the detective told the prisoner as to the notes being counterfeit was not receivable on this charge, and, in my opinion, such objection was well taken. That the detective told the prisoner that the notes were counterfeit, when in fact they were not, did not make them counterfeit any more than belief in the detective's statement would change their character.

But Mr. Cartwright urged upon us that the conviction was good because the statute 51 Vict. ch. 40, sec. 2, (D.) made it an offence to offer to purchase what purported to be counterfeit tokens of value. The answer to that is that no such case is before us; and, therefore, we are not either called upon or permitted to express any opinion upon it.

It was further urged that a letter from the prisoner, as to the reception of which an independent question has been submitted to us, shewed an offer to purchase counterfeit tokens of value.

It may or it may not have done so, but we observe that Mr. Osler submitted at the trial that the counterfeit token must be something *in esse* and must be false; and the case confines our opinion to the question of offering to pur-

Judgment. chase notes *in esse*, i.e., "the notes in question." Again it
Rose, J. must be answered no such question has been submitted to us for our opinion.

Had we been called upon to decide the meaning of "what purports to be," I confess I should have much difficulty in arriving at a satisfactory conclusion. According to the cases, however, "it imports what appears on the face of the instrument," and therefore what was said to the prisoner, or what he thought or believed, would not be of any moment.

In Russell on Crimes, 5th ed., vol. 2, p. 697, we find as follows: "With respect to the word 'purport', it should be well observed that it imports what appears on the face of the instrument, as a want of attention to this meaning of the word has been fatal to many indictments. In a case where the instrument was laid in some counts of the indictment to be a paper writing purporting to be a bank note, it was holden that as it did not purport on the face of it to be a bank note the count could not be supported."

In Wharton's Criminal Law, 9th ed., vol. 1, p. 738, it is said: "If we look at the point closely there is a repugnancy on the face of an indictment which avers that the defendant 'forged' the 'note of A. B.'; for if the note is forged, it is not the note of A. B.; and if it is the note of A. B., it is not forged. Hence, in the old practice, there have been cases in which the Courts, following a strict logical necessity, have declared that the omission of 'purporting to be' is fatal."

See also *Rex v. McDonald*, 12 U. C. R. 543, and *Regina v. Portis*, 40 U. C. R. 214.

See further Bouvier's Law Dict., 15th ed., p. 489; 1 Chitty's Criminal Law, 2nd ed., 235; *Rex v. Gibbs*, 1 East 173, 179.

As far as I am aware the statute is new. I cannot find any prior statute with similar provisions or language.

It is made an offence to advertise or purport to advertise any counterfeit token of value or what purports so to be.

I am unable to satisfy myself as to the meaning of purporting to advertise what purports to be counterfeit tokens of value. Judgment.
Rose, J.

Again, "Giving or purporting to give * * information where * * any counterfeit token of value or what purports to be a counterfeit token of value." "Offering or purporting to offer for sale," "purchases * * or offers to purchase * * any *such* counterfeit token of value, or what purports so to be" "*such* counterfeit," would seem to refer to something *in esse*, especially when followed by "what purports," for can anything purport to be something else without itself being?

In sec. 22 of R. S. C. ch. 165, I find it to be a felony to engrave "any promissory note or part of a promissory note, *purporting* to be a blank Dominion or Provincial note." There clearly the note on its face must purport to be a Dominion or Provincial note.

Our enactments as to offences respecting coin, etc., seem to have been taken chiefly from 24 & 25 Vict. ch. 99, Imp.

In sec. 14 I find it to be an offence to "*offer* to buy," etc., "any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current copper coin," etc.

This is the only section that I have noticed which makes an offer to buy an offence; and the offence is clearly not made out unless there be in existence counterfeit coin resembling or apparently intended to resemble current coin. Can the words "purport" "purporting" be intended to mean the same as "resemble" "apparently intended to resemble," which are the expressions used in the various sections of 24 & 25 Vict. ch. 99?

It is also to be observed that by 31 Vict. ch. 14, sec. 6, (D.) now sec. 22 of R. S. C. ch. 165, it is made a felony for any one knowingly to offer, utter, dispose of or put off or have "in his custody or possession any paper upon which any blank Dominion or Provincial note, or *bank note*, or *part of any such note*, or any name, word or character resembling

Judgment. or apparently intended to resemble, any such subscription,
Rose, J. is made or printed, etc.

But such section does not make it an offence to offer to purchase such paper.

By sec. 2 of 37 Vict. ch. 41, (D.) to offer for sale any counterfeit token of value, which is declared to include paper money or other evidence of value, and to offer to purchase the same, is made a felony.

Is it an offence under both sections to offer for sale an incomplete bank note; or must not ch. 40 be confined to tokens of value, *i.e.*, complete in form? The interpretation clause, sec. 1, reads: "In this Act the expression 'counterfeit token of value' means any spurious or counterfeit coin, paper money, inland revenue stamp, postage stamp, or other evidence of value, by whatever technical, trivial or deceptive designation the same may be described." Would such an interpretation include an incomplete bank note? It might "resemble or apparently be intended to resemble" and yet not be complete.

So far as I have seen there is no clause in terms making the desire or intention to purchase counterfeit money, an offence, no such money being in existence.

I have thus far discussed the section, as there was much argument upon it; but, as I have said, I do not think that our opinions on such questions are material for the determination of the case reserved for us.

In my opinion the first question must be answered for the prisoner, and the conviction quashed.

The second question was as to the admissibility in evidence of a letter written by the prisoner and which came into the possession of the detective, and which letter was referred to in a conversation between the prisoner and the detective.

The prisoner asked the detective if he had received the letter, to which the detective answered in the affirmative, and, thereupon, shewed the prisoner the letter, asking him if it was his letter, written by him, and the prisoner said it was.

I think, as part of the history of the case, it was properly received in evidence and properly read to the jury, and could not have been excluded any more than could oral statements made by the detective to the prisoner in course of conversation. The letter upon the face of it shewed that the prisoner was desirous of purchasing counterfeit coin, and having been shewn the letter during the conversation which I have referred to, it was fairly to be inferred by the jury that he then read it or knew its contents, and both he and the detective knowing its contents, it in that sense formed part of the subject matter of that conversation. I think the evidence of the conversation would not have been complete if this letter had been withheld. It was good evidence of intent if the main fact had been established.

Judgment.
Rose, J.

I have no doubt that it was properly received in evidence.

MACMAHON, J. :—

During the argument I did not notice that the case reserved for the consideration of the Court was within such very narrow limits.

The case reserved by the learned Chief Justice is as follows : " The prisoner was indicted under 51 Vict. ch. 40 sec. 2, (D.) for offering to purchase counterfeit tokens of value. The whole case appears in the evidence now submitted to the Court. The notes in question were not counterfeit, although the prisoner believed them to be so, and offered to purchase them under that belief. The question for the Court is whether under these circumstances the prisoner could be convicted."

Where a person exhibits to another bank notes representing them as counterfeit when in fact they are not so, the offer to purchase such notes cannot be an offence under the Act, as the prisoner was offering to purchase that which the party had to sell, which were *not* " counterfeit tokens of value." And the person who so had possession

Judgment. of the notes could not by making a false representation to
MacMahon, the prisoner as to the character of such notes, obtain from
J. the prisoner the offer to purchase what was not in his possession to sell. I am now dealing with the notes in this particular case and the statement in the reserved case that they were not counterfeit.

It may be that the clause of the statute would require to be amended in order to reach a person offering to purchase counterfeit tokens not *in esse*.

I agree that the letter proved to have been written by the prisoner was proper evidence to be submitted to the jury.

I think that on the questions submitted there must be judgment for the prisoner quashing the conviction.

Conviction quashed.

[COMMON PLEAS DIVISION.]

THE MIDLAND LOAN AND SAVINGS COMPANY V. COWIESON.

Bills of sale and chattel mortgages—Mortgage to secure existing indebtedness—Affidavit of mortgagee—Omission of statement of indebtedness—Affidavit under 6th section of R. S. O. ch. 125, instead of 2nd section—Invalidity.

A mortgagee under a chattel mortgage to secure an existing indebtedness made the affidavit of *bona fides* required by the sixth section of R. S. O. ch. 125, for a mortgage to secure future advances instead of the affidavit required by the second section :—

Held, that the affidavit was defective in not stating “that the mortgagor was justly and truly indebted to the mortgagee,” and that the mortgage could not be looked at to aid the affidavit in this requirement.

THIS was an interpleader issue tried before FERGUSON, Statement.
J., at Lindsay, at the Autumn Chancery Sittings of 1890.
September, 20, 1890. *McSweyn* and *D. R. Anderson*,
for plaintiffs.

Moss, Q. C., and *Chisholm* for defendant.

The facts are stated in the judgment.

January 12, 1891. FERGUSON, J.:—

This is an interpleader issue, at the instance of the sheriff of the county of Victoria. The execution under which the sheriff had made the seizure was in an action by the above named defendant, Alexander Cowieson, against one Thomas Douglas; and the goods were seized as being the goods of the said Thomas Douglas, against whom the execution was. The goods, when seized, were on lot No. 10, in the first concession of the township of Fenelon, which lot was in the occupation of the said Thomas Douglas.

The claim of the plaintiffs in this issue is made under a chattel mortgage, made in their favour by the said Thomas Douglas and one Amos A. Douglas. In the chattel mortgage Thomas Douglas, so named in the issue, is called Thomas J. Douglas; but no question was raised, nor is

Judgment. there, I think, room for a question as to the indentity of the person.
Ferguson, J.

The chattel mortgage bears date the 25th day of March, 1890, and appears to have been filed on the 29th day of the same month. The claim of the defendant Cowieson is made under the execution against Thomas Douglas, above mentioned, he being the plaintiff therein.

Amongst the goods mentioned and described in the record (the issue) and in the chattel mortgage, or rather the schedule attached to the mortgage, are, "One brown mare eleven years old," and "One brown mare three years old." These two mares were shown to have been the property of Amos A. Douglas at the time of the making of the mortgage. The execution debtor, Thomas Douglas, has then no right to them, nor any property in them, nor had he any such right to or property in them at the time of the seizure under the writ of execution, which was tested on the 29th day of April, 1890.

At the close of the case I expressed the opinion that the plaintiffs in the issue should succeed as to these two mares, as the defendant Cowieson could have no claim in respect to them under his execution against Thomas Douglas; and the plaintiffs in the issue appeared to have a good title to the mares under their mortgage, executed by the then owner of them, who was not indebted to Cowieson at all, or in any way affected by the writ of execution.

The plaintiffs (the company) were also mortgagees from Thomas Douglas of the above mentioned lot or farm; and the chattel mortgage was given to secure arrears of interest upon that mortgage.

At the close of the case I also expressed the opinion that the plaintiffs (the company), in making the transaction of the chattel mortgage, acted in perfect good faith, without any intent to defeat, hinder or delay the creditors of the mortgagor or any of them, or to gain a preference over such creditors or any of them, or any notice or knowledge of the existence of any such intent on the part of the mortgagor, Thomas Douglas, if it existed.

I found upon the evidence that these plaintiffs had not, Judgment. in making the transaction of the chattel mortgage, offended Ferguson, J. against the provisions of the statute.

I found, also, that the transaction of this chattel mortgage had the effect of "preferring" these plaintiffs to the other creditors of the said Thomas Douglas, but that they could have operated the same preference, or what may, for want of a better expression, be called a preference having the same effect, by simply distraining upon these goods of Thomas Douglas under the provisions in that behalf contained in their other mortgage. That the plaintiffs could have done this was admitted by counsel in view of the cases cited.

The plaintiffs appeared to me to have made the transaction of the chattel mortgage, instead of making a distress, simply because they did not desire to act harshly with Thomas Douglas, and to give him, as it were, another chance and more time to pay the arrears of interest on the other mortgage.

The mortgagor, Thomas Douglas, says: "I gave the company (the plaintiffs) the chattel mortgage because I thought they would seize my stuff and take it away from my creditors and me. They asked me if I could pay \$100. I told them I could not. They then asked me for the chattel mortgage; and I gave it to them." This witness says also, that all the recitals in the chattel mortgage are true, these having been read to him in Court. He says he did not tell the company anything about his other debts, and he does not think they knew anything about them.

There was much discussion as to whether or not Thomas Douglas, the mortgagor, was in insolvent circumstances, or unable to pay his debts in full, etc., within the meaning of sec. 2 of the Act, R. S. O. ch. 124.

The proper conclusion on this subject depends largely, if not wholly, upon the value that is to be placed upon his farm,—the one before mentioned. At the trial I thought that circumstances appeared indicating that the value stated by Thomas Douglas himself was likely to be

Judgment. nearer accuracy than the value stated by other witnesses, and I think I said something of the sort; but, upon reconsidering the evidence on this subject, which was chiefly "opinion evidence," I think I should not be justified in finding that he, Thomas Douglas, was not in insolvent circumstances and unable to pay his debts in full within the meaning of the Act referred to.

Ferguson, J.

The consideration of this question does not involve, in this case, matters of so great nicety as in some cases, for the reason, as I have said, that the conclusion depends upon the one thing—the value of the farm. As to this the opinions differ very widely, and upon none of the testimony except his own could he be in solvent circumstances.

I think I must find that he was insolvent, etc., within the meaning of the statute.

Authorities were referred to by counsel going to shew, as was contended, that, even if Thomas Douglas were at the time insolvent, yet, as the transaction was honest throughout, the chattel mortgage was good and valid. The contrary of this was contended; and, as some of the cases on the subject were pending before the appellate Courts, I thought it proper to withhold the judgment until some of those cases should be decided.

The decision of the Supreme Court in the case of *Molsons' Bank v. Halter*,* which I have seen by copies of the manuscript judgments of most of the learned Judges, seems to comprehend the matter of law in dispute here; and I think I am now in a position to say, in obedience to the decision, that the chattel mortgage should be held to be good and valid, unless it is found to be defective under the provisions of the Act, commonly known as the Chattel Mortgage Act, R. S. O. ch. 125.

There was no change of possession of the goods; and the plaintiffs have to rely upon the validity in every respect of their mortgage.

The mortgage was filed in good time; and the only objection taken, or question raised, was as to the sufficiency

* Since reported in 18 S. C. R. 88.

or not of the affidavit of the mortgagee, which is required by the Act. The debt secured by the mortgage was a debt then present and existing, as appears by the evidence and by the mortgage itself, which recites the fact of the arrears of interest upon the other mortgage, that the mortgagees were pressing for payment of such arrears, and an agreement between the mortgagor and the mortgagees for an extension of time for the payment of such arrears upon their getting this chattel mortgage securing the same, Amos A. Douglas joining therein, so as to have embraced in the security to the mortgagees such portion of the property mortgaged as belonged to him. Judgment.
Ferguson, J.

It appears, as I think, that a mistake was made in considering this a mortgage under the sixth section of the Act to secure further advances, etc. However this may have been, the affidavit of the mortgagee is one that it is admitted would be sufficient if the matter, or transaction, had been one falling under this sixth section; and the question, the sole remaining question, seems to be, whether or not the affidavit, whether by accident or not, is sufficient, the transaction falling, not under the sixth, but under the second section of the Act.

The affidavit and the mortgage are each partly printed and partly written, and are upon the same sheet (double sheet) of paper. The goods are mentioned and described in a schedule attached thereto, which schedule is referred to in the body of the mortgage in the part thereof where the goods would naturally be described if a schedule had not been employed, namely, after the words "All and singular," and before the *habendum*. The affidavit is on the inside of the sheet, at the end of the mortgage, and immediately below or after the signatures and seals of the mortgagors. The mortgage is not executed by the mortgagees.

The affidavit is: "That the foregoing mortgage truly sets forth the agreement entered into between the said company and the said Thomas J. Douglas and the said Amos A. Douglas, therein named, and truly states the

Judgment. extent of the liability intended to be created by such
Ferguson, J. agreement, and covered by the foregoing mortgage: that the foregoing mortgage is executed in good faith, and for the express purpose of securing payment of the money so justly due or accruing due as aforesaid: that the foregoing mortgage is not executed for the purpose of securing the goods and chattels, mentioned in the schedule attached hereto marked 'A,' against the creditors of the said Thomas J. Douglas, or against the creditors of the said Amos A. Douglas, or to prevent such creditors from recovering any claims which they may have against the said Thomas J. Douglas or Amos A. Douglas."

The second section of the Act requires that the affidavit shall state that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage: that it was executed in good faith, and for the express purpose of securing the payment of money justly due, or accruing due, and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor, or of preventing the creditors of such mortgagor from obtaining payment of any claim against him.

It was contended that the affidavit and the mortgage might and should be looked at, if necessary, for the purpose, as it were, of gathering those things that are required by section two of the Act to be in the affidavit; and that if this were done in the present case, all these requisites would be found.

The case *Jones v. Harris*, L. R. 7 Q. B. 157, and the cases referred to in the judgments of the learned Judges, seem to show that, for some purposes at least, where there is an ambiguity in a necessary statement in the affidavit of *bond fides*, the ambiguity may be removed by looking at the mortgage if the necessary information is to be found there; but I have not found any case, nor was any referred to, shewing or indicating that one may look at the affidavit and the mortgage to find those things that are required to be stated in the affidavit, except in the case of an ambiguity

in the description or the like in the affidavit; and the liberty so to do seems even then to be confined to cases in which the statement is made in the affidavit, accurate, so far as it goes, but, by reason of ambiguity, insufficient to answer the purposes assumed to have been intended by the Act of Parliament, and the matter before ambiguous is made plain by looking at the mortgage. This is the furthest that I have found any authority going. It appears to me a subject in respect to which it would be most dangerous, if not pernicious, to attempt to state any rule, and each case, as it arises, must, I apprehend, stand upon its own footing, or merits.

Judgment.
Ferguson, J.

The first requirement of section two is that the affidavit shall state that the mortgagor is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage.

This statement must be in the affidavit. It must be sworn to. If there is any difference in the importance of the various statements required to be in the affidavit, this would seem to be the most important of them, for the existence of the debt is the foundation of the transaction; and, I venture to say, that this statement is not in the affidavit at all. The papers are in the form that I have before endeavoured to describe. True it is that each of the three clauses in the affidavit refers to the "foregoing mortgage."

The first clause has reference to an agreement, and the extent of the liability intended to be created by it and covered by the mortgage. The second clause says that the mortgage is executed in good faith and for the express purpose of securing payment of the money so justly due or accruing due "as aforesaid."

This, I think, must be taken to have reference to the liability intended to be created, mentioned in the first clause, unless the mortgage and affidavit are taken as one document, which, I think, cannot be done, though they are on the same sheet of paper and as before stated; but even if this is otherwise, there is yet, I think, not the required oath that the mortgagor is justly and truly indebted to the

Judgment. mortgagee in the sum mentioned in the mortgage, or its
Ferguson, J. equivalent, even if an equivalent would be unobjectionable.

The third clause of the affidavit, so far as I see, is in accordance with the requirement of the Act, except that it uses the word "securing" instead of the word "protecting," the one being the word used in the sixth section and the other the word used in the second section; the word "recovering" instead of "obtaining;" and the word "hereto" in the expression "attached hereto," is possibly erroneous; but this clause has no reference to the requirement of the statement regarding the real existence of the debt from the mortgagor to the mortgagee. While I think this an honest mortgage, and one that should be supported if possible, I think I am bound to say that, in my opinion, this affidavit is defective, on account of the absence of the statement which it should contain, that the mortgagor is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, and that for this reason it does not comply with the requirements of the statute, and is void as against the defendant Cowieson, a creditor of the mortgagor, that is, so far as relates to the goods that were of Thomas J. Douglas.

The plaintiff in the issue claimed title under this mortgage only. The defendant in the issue claimed under his writ of execution.

There will be judgment for the plaintiff in the issue in respect of the two mares that were, or had been, the property of Amos A. Douglas; and judgment for the defendant in the issue (Cowieison) in respect of the remainder of the property in question.

The costs should, I think, be divided or distributed in analogy to the practice in this respect that obtained in the Common Law Courts before the passing of the Judicature Act.

Order accordingly.

[COMMON PLEAS DIVISION.]

ROBB V. ROBB ET AL.

*Husband and wife—Indian marriage—Evidence of lawful marriage—
Declarations of deceased husband as to—Legitimacy of children.*

In proof of the celebration of a marriage evidence was given that the husband who had gone from this province to British Columbia, had gone through the ceremony of marriage according to the Indian custom with an Indian woman, he paying \$20 to her father; and that after the marriage they cohabited and lived together as man and wife, and were recognized by the Indians as such up to the time of the wife's death, prior to 1879, the giving of presents and cohabitation being regarded by the tribe as constituting a marriage. The issue of the union were two children, a daughter and another child who died. About 1879, the husband returned to this province bringing the daughter with him. Evidence was also given of declarations made by the husband on his return that he had been legally married in the same manner as he would have been had the marriage taken place here, and that the daughter was his legitimate child; and that he had brought her up as such:—
Held, that, apart from the Indian marriage, there was evidence from which a legal marriage according to the recognized form amongst Christians could be presumed, and that the daughter was therefore his legitimate child and "legal heir."

THIS was an action tried before ROBERTSON, J., at King-Statement-ston, at the Autumn Chancery Sittings of 1890.

Kirkpatrick, Q. C., for plaintiff.

Walkem, Q. C., for defendant William Robb.

McDonnell, Q. C., for the infant.

J. B. Walkem, for defendant Bajus.

The facts are stated in the judgment.

February 2, 1891. ROBERTSON, J.:—

The plaintiff is the widow of the late John Robb, of Kingston, and a devisee and executrix under his last will and testament. The defendant Bajus is an executor. The defendant Sarah Jane Robb is an infant of about the age of nineteen years, and claims to be the lawful daughter, and "legal heir" of William George Robb, now deceased,

Judgment. who was a devisee under the said will, and a son of the testator. The defendant Rogers is the administrator of the estate of the said William George Robb.

Robertson, J.

The question to be disposed of arises under the will of John Robb, and involves the question of the legitimacy of the infant defendant.

Both real and personal estate is devised and bequeathed under the will to the son William George Robb, subject to the following :

5. "I also will and bequeath, that if my said son Wm. Geo. Robb, should die unmarried, leaving no legal heir before the death of my wife, she shall by this my last will, have full power to dispose of all my real estate wherever it may be in Canada, or elsewhere, and divide the proceeds equally between her relatives and mine, giving to my relatives the half to one or more to those she may think in her opinion most deserving of it. Provided that if my son should marry and have an heir, all my real estate, but what is mentioned in section second of this will, I leave to my son and his heirs, and all moneys on accounts due to me at my death, securing to my wife the amount mentioned in this my last will, for her support during her life."

The will bears date 24th June, 1872. The testator died before 1st July, 1886. The son, William George Robb, also died on or about the 4th November, 1888, intestate, leaving him surviving, the infant defendant, who claims to be his legitimate child, which, however, the plaintiff and the other defendants deny. The facts, as regards the legitimacy or illegitimacy of the infant, are as follows :

Some time previous to the year 1869 the deceased, William George Robb, left Ontario and went to British Columbia, and there, in 1869 or thereabouts, was married to an Indian woman named "Supul-Catle," daughter of "Wah-Kus," the chief of the Comox tribe of Indians, whose wife (the mother of "Supul-Catle") was "Klach-Woshum-Keach," and the only wife "Wah-Kus" had at that time. Robb was married to "Supul-Catle" according to the Indian custom, and paid the father, "Wah-Kus," \$20 in half-dollar pieces. There was a feast given by "Wah-Kus" in honour of his daughter's marriage with a white man. The giving of presents to her father and the relations of the woman, and the acceptance thereof by him,

and the cohabitation by the man and woman is, according to the Indian custom, a marriage. Robb lived for some time in the house of "Wah-Kus" before the Indians would agree to the marriage. Robb and "Supul-Catle," from the time of this marriage, cohabited and lived together as man and wife, and were so regarded until the death of "Supul-Catle," which took place some time previous to 1879. In the meantime two children had been born to Robb by "Supul-Catle," one of whom died, and the survivor is the infant defendant.

Judgment.
Robertson, J.

In or about the year 1879, Robb returned to Ontario, bringing the infant defendant with him, who he declared, was his legitimate child, and he took her to the house of the plaintiff, who was his, Robb's, stepmother. The child remained there for some time, and was afterwards placed in the care of a Mrs. Rappe, a first cousin of Robb, to whom he paid \$9 per month for her board, etc. She remained with Mrs. Rappe eight or nine years, and after that was kept by Robb's brother, the defendant William Robb. Robb always spoke of the child as his legitimate daughter, and said that he had been legally married to her mother; and he also said that he was married in British Columbia in the same way that he would have been married, had the ceremony taken place in Ontario. But confirmatory evidence of this was not given, nor was there any evidence to shew whether it would have been possible at the time for the ceremony to have been performed by a priest or clergyman in that part of the country. The evidence also shewed that polygamy was an acknowledged right amongst the Comox tribe, although the chief of the tribe, "Wah-Kus," had not availed himself of this right.

At the time of this union, that is, of the alleged marriage, between Robb and "Supul-Catle," British Columbia was a British colony, independent of and forming no part of the Dominion of Canada, and had a legislature of its own, and all the functions of self-government to the same extent as other British colonies where responsible government exists. The Comox tribe of Indians, as I

Judgment. understand it, were and are a nomadic band, which frequents British Columbia; and there is no evidence before me to show whether they are Christian or Pagan; but I think I can fairly assume from what has appeared, that they are the latter.

It is contended that a case has been made out in favour of the infant defendant: that, under the circumstances detailed in the evidence, she must be presumed to be the legitimate child of William George Robb: that there is ample evidence of repute to show that the parents of the infant defendant were legally married: that, apart from the ceremony, which is proven to have taken place, the presumption is in favour of legitimacy; and that Robb's repeated declarations, after his return to Ontario, and after the death of "Supul-Catle," that he had been legally married to her, must inure to the benefit of the infant defendant.

It is also contended that his treatment of her for nine years before his death, and during the whole of the time that he lived, from the date of his return with the child from British Columbia, shows conclusively, at all events, that, so far as he could, he made it manifest that she was his lawfully begotten child.

I confess I am much impressed with these contentions; and, in the absence of anything to the contrary, it appears to me that Robb himself considered that this child had the legal status of, and was his legitimate daughter. It is clear he considered that he was bound, either morally or legally, or by the ties of paternal affection, to provide for and nourish her, to the best of his ability; otherwise, it is not conceivable that he would have brought her while a mere infant, some three or four years of age, from her mother's people, to this province, among a strange people.

But it remains to be seen whether all that is of itself sufficient to constitute her, in the eye of the law, a "legal heir," so as to qualify her to take and hold the property devised to her late father under the will of the testator, under the provision above set forth.

The claims of the infant were very ably sustained before me by Mr. George McDonnell, Q.C.; and he argued very forcibly, that the case was on all fours with the very celebrated case of *Connolly v. Woolrich*, 11 L. C. Jurist. 197; and, although that case is not binding, it is entitled to the very greatest respect. Like the most of the cases, where new questions arise, it is very elaborately discussed, and the able and learned Judge (Mr. Justice Monk) who delivered the judgment of the Court, has entered at length into a series of the circumstances of the case, and also of the law by which it was to be determined. The facts were not, I think, quite the same as those in this action, although they are to a certain extent very similar. There it was however *Held, inter alia*: "That a marriage contracted where there are no priests, no magistrates, no civil or religious authority, and no registers, may be proved by oral evidence, and that the admissions of the parties, combined with long cohabitation and repute, will be the best evidence. That such marriage, though not accompanied by any religious or civil ceremony, is valid. * * That an Indian marriage between a Christian and a woman of that nation or tribe is valid, notwithstanding the assumed existence of polygamy and divorce at will, which are no obstacles to the recognition by our courts of a marriage contracted according to the usages and customs of the country. That a Christian marrying a native according to their usages, cannot exercise in Lower Canada the right of divorce or repudiation at will; though:—*Semble*, He might have done so among the Crees. That an Indian marriage according to the usage of the Cree country, followed by cohabitation and repute, and the bringing up of a numerous family, will be recognized as a valid marriage by our courts, and that such a marriage is valid."

After considering with great care all the facts and circumstances detailed in this very interesting case, I find great difficulty in coming to the conclusion, that under the circumstances detailed in the evidence before me, in regard

Judgment. to the ceremony performed according to the usages and customs of the Comox tribe of Indians, in regard to the marriage, alleged to have taken place between William George Robb and "Supul-Catle;" that such ceremony constituted a valid and legal marriage.

It will be observed that the state of things existing at the time of the two marriages in the two countries—viz., Athabaska and British Columbia, were entirely different. In Athabaska there were no priests, magistrates or other civil officers, who could perform the ceremony—if a ceremony in presence of such a functionary, was and is necessary. The distance from civilization was so great, that had Connolly, whose moral character seems from the report to have been without reproach, desired, whether from feeling or interested motives to take the Indian maiden Susanna to his home, he had one of three courses to pursue; that was to marry her according to the custom of her tribe; to travel with her between 3,000 or 4,000 miles in canoes, and on foot, to get married by a priest or magistrate; or make her his concubine; whereas the country occupied by the Comox tribe, was a part of British Columbia, at that time under the jurisdiction of a government and parliament of its own; and although the evidence is not clear on the point, I think it sufficiently appears that there were priests and magistrates within a reasonable distance, and that a ceremony recognized by law could have been performed at a place not very far distant from where the ceremony in question did take place; and as there is evidence *primâ facie* sufficient to warrant me in concluding that a marriage according to the law of Christianity did take place, I prefer, basing my judgment on other evidence than that of the Indian usage and custom, without, however, deciding or embarrassing the case by deciding that what did take place according to that usage and custom, does not constitute a valid and legal marriage under the circumstances detailed in the evidence before me.

In order then to a consideration of the cases on the other grounds, I find as follows: 1. That Robb re-

peatedly declared that he had been married to "Supul-Catle," the mother of his child, the infant defendant. 2. That they had been married in the same way, as they would have been, had the ceremony taken place in Ontario. 3. That the infant defendant was his daughter. 4. That he brought her up as his legitimate daughter. 5. That after the death of "Supul-Catle," and after the death of another child he removed from the country of the Comox Indians, in British Columbia, to Ontario, bringing with him the surviving child, the infant defendant, who he introduced to his own relations, at Kingston, as his legitimate daughter, with whom she remained until after his death in 1888, during all of which time he supported and maintained her, in every respect as one would support and maintain a legitimate child. 6. That during the lifetime of "Supul-Catle," from the time she was taken by Robb to be his wife, she was recognized by all their friends and acquaintances in British Columbia as his wife; and that this was uniform and positive.

I also find that polygamy existed among the Comox tribe, but as I do not base my judgment on the fact of the ceremony which took place between the parties, according to the custom and usages of that tribe, I do not think it necessary to consider in relation thereto the cases relied upon by the plaintiff and the other defendants, viz., *Re Bethell*, 38 Ch. D. 220, and *Hyde v. Hyde*, L. R. 1 P. & M. 130 in relation thereto, although I may say that I think upon a close examination of these cases it will be found that they are distinguishable, even on the ground of polygamy, etc.

I think this case can be disposed of on the well-known principle of law and morality, which is, that when a doubt exists as to the legality of a marriage, courts of justice are bound to decide in favour of the alleged marriage. All law, all morality require and sanction this view even of a doubtful case.

In Hubback on Succession,—(a work highly commended by Lord Selborne, C., in *Lyell v. Kennedy*, 14 App. Cas.,

Jadgment.

2. Robertson, J.

Judgment. at p. 449),—I find, at p. 243, "Reputation of marriage may be proved by the testimony of living witnesses speaking to the existence of that reputation; by the declarations of the parties or their relatives, if deceased; and by the conduct of the parties themselves, and of third persons towards them, or by other facts or circumstances indicative of belief and understanding on the subject. The declaration of the contracting parties and their relatives are, however, also admissible on the independent ground of being hearsay evidence of a matter of pedigree within the rule which admits such evidence of such matters."

Robertson, J.

And again, at p. 244, "The declarations of the parties themselves, if deceased, that they were, or were not married, provided they were made *ante litem motam*, are admissible evidence of the fact declared. Mr. Justice Buller says that they are not to be given in evidence directly, but may be assigned by the witness as a reason for his belief, the one way or the other. But though, undoubtedly, they may have formed the basis of a reputation deposed to by the witness, they are also evidence on the footing of simple hearsay declarations in a matter of pedigree, and have been admitted in that character. Per Pratt, C. J.: *Haywood v. Firmin*, cited as in Peake's N. P. Cas. 233*n*; *Beard v. Travers*, 1 Ves. Sen. 313. Per Lord Kenyon in *Reed v. Passer*, 1 Peake N. P. Cas. 232.

In the *Berkeley Peerage Case*, Lord Berkeley's declaration that he was not married before the admitted marriage was received in evidence. But these assertions may be controverted, for it might have been made to preserve reputation, to promote the interests of their children, or in ignorance of the invalidity of the fact of marriage, as to which see *Kennell v. Abbott*, 4 Ves. 302; and *Giles v. Giles*, 1 Keen 685.

In this case there was no controversion. The plaintiff and other defendants relied wholly upon the assertion that the only marriage which took place was that according to the usage and customs of the Comox tribe. I cannot give way to this contention. From all that appears it is quite

possible that a marriage according to the recognized form among Christians may have taken place between these parties; and the declaration of Robb that he was legally married to the infant's mother, and that he was married in British Columbia in the same manner as they would have been had the ceremony taken place in Ontario, must be received, I think, as evidence of the fact when taken into account with cohabitation, and the birth of children, and the bringing up of these children, and the treatment of their mother as his wife, and her recognition by their friends and acquaintances as such, that such marriage did take place.

The infant defendant it must be noted is placed at a great disadvantage. In the first place every one of her father's relations, as well as the relations of the testator's widow, who is the stepmother of the infant's father, are interested against her by reason of the provisos in the testator's will, that the lands and personalty in question, in case she is illegitimate, go to them in such manner as the widow may think proper; consequently it is useless to look to them, and they were not called, nor did they offer to bear testimony even on their own behalf, either for or against the infant; in fact they are directly interested in its being declared that she is illegitimate.

Then there is this view of the case, viz.: Supposing for argument's sake that there was no marriage ceremony, other than that according to the usages and custom of the Comox tribe, was that ceremony, quaint as it may seem to a Christian, not a good and valid marriage, under the authority of *Dalrymple v. Dalrymple*, 2 Hagg 54, and other cases since then, and *Campbell v. Campbell*, 1 Sc. Ap. 182? There is no doubt, Robb, in the presence of witnesses, took "Supul-Catle" to be his wife, and so expressed himself; and there is no doubt "Supul-Catle" consented to be his wife, and they afterwards consummated what then took place by cohabitation and living ever after during the life time of "Supul-Catle," together as man and wife.

Judgment. In *Campbell v. Campbell*, above referred to, it was held
Robertson, J. that a connection commencing in adultery, which however was not pretended in this case, may on ceasing to be adulterous, become matrimonial by consent, and may be evidenced by habit and repute, the parties being at liberty to intermarry; and further that the alteration in the character of the connection from adultery to matrimony need not be indicated by any public act, or by any observable change in the outward demonstration.

And the Lord Chancellor there held, that proof of the legitimacy of the offspring is proof of the legitimacy of the marriage. And according to Lord Mansfield, C. J., in the *Berkeley Peerage Case*, 4 Camp. 401, at p. 416, "If the father is proven to have brought up the party as his legitimate son, this is sufficient evidence of legitimacy till impeached, and indeed it amounts to a daily assertion that the son is legitimate."

In Eversley on Domestic Relations a short sketch of the origin and growth of the laws of England, respecting marriage is given, and *inter alia* that learned author says: "The tendency in England, as far as legislation has hitherto progressed, has been to regard marriage less as a religious obligation and more as a civil contract; for matrimony with all its requirements was formerly looked upon as a spiritual act within the province of the courts Christian; but the spirit in which modern legislation affecting it has been conceived, clearly evinces that its temporal and civil motive is to be held paramount and the basis of present and future change:" p. 16. Again, "as time went on the Church clothed their contract more and more with the character of a religious ceremony, and treated it less and less as a civil contract affecting the state in which the parties lived. But the *consensus* of the parties was the vital and essential portion of the contract, and those who had no impediment barring their union, might by agreeing to take each other as man and wife, contract a good and effectual marriage. * * The effect of the *consensus* of the parties being the important

and essential element in forming this vinculum, and the ceremonies attending the formation but incidents, was that frequent marriages were made in which the consent of the parties was expressed, but not by any outward manifestation of religious rites :” p. 17. Judgment.
Robertson, J.

Lord Howell, in his celebrated judgment in *Dalrymple v. Dalrymple*, before referred to, in discussing, what are termed “irregular marriages,” and which are known by the name of *Sponsalia per verba de presenti*, and *sponsalia per verba de futuro cum copula*, in the first of which such words were used, as “I take you to be my wife.” “I marry you.” “You and I are man and wife.” In the second, “I will marry you,” or, “I will take you to be my wife”—said: “Different rules relative to their respective effects in point of legal consequence, applied to these three cases—of regular marriages—irregular marriages—and of mere promises or engagements. In the regular marriage everything was presumed to be complete and consummated both in substance and in ceremony. In the irregular marriage everything was presumed to be complete and consummated in substance but not in ceremony; and the ceremony was enjoined to be undergone as matter of order.

In the *promise* or *sponsalia de futuro*, nothing was presumed to be complete or consummate, either in substance or ceremony. Mutual consent would release the parties from their engagement; and one party, without the consent of the other, might contract a valid marriage, regularly or irregularly with another person; but if the parties who had exchanged the promise had carnal intercourse with each other, the effect of that carnal intercourse was to interpose a presumption of present consent at the time of the intercourse, to convert the engagement into an irregular marriage, and to produce all the consequences attributable to that species of matrimonial connection.” p. 65.

This was the state of the canon law before the Council of Trent, which compelled that council to introduce the necessity of marriages among Roman Catholics being cele-

Judgment. brated in the presence of the parish priest, after due proclamation of the banns, or the obtaining of an episcopal license. But the marriages not celebrated in the presence of the church, etc., were only deemed irregular, were discountenanced, and were visited with punishments, and ecclesiastical censure, etc. Morally speaking, however, they were good, as far as they went, in the eyes both of church and state, and the issue were legitimate—In a word, as said by Willes, J., in *Beamish v. Beamish*, 9 H. L. Cas., at p. 306: "The general law of Western Europe, before the Council of Trent, seems clear. The fact of marriage, viz., the mutual consent of competent persons to take one another for man and wife during their joint lives, was alone considered necessary to constitute true and lawful matrimony." And this is the law of Scotland at the present time.

If I understand the case *Re Bethell*, 38 Ch. D. 220, correctly, it appears to me that the marriage there would have been held good and valid, had it not been for the fact that polygamy existed in the Baralong tribe into which Bethell married; and it was on this ground, that he, as a Baralong, had the right to take more than one woman to be his wife, that his marriage with "Teepoo," according to the usage and custom of that tribe, was declared invalid according to the law of England, because it was not formed on the same basis as marriages throughout Christendom, and was not, in its essence, "the voluntary union for life of one man and one woman to the exclusion of all others."

Then again, in that country polygamy was legal. In British Columbia, at the time of the marriage between Robb and "Supul-Catle," it was illegal; but as before stated, I do not base my judgment on that ceremony at all, for the reasons already given, and had *Re Bethell* been free from the evil of polygamy, I think it would have been declared that the union between Bethell and Teepoo would have been a valid marriage, as it was formed—in so far as the mutual consent of the parties was concerned, followed by cohabitation and the birth of a child—on the same basis as marriages throughout Christendom are formed.

On the whole, I am of opinion that it must be declared Judgment.
that the infant defendant Sarah Jane Robb is the lawful Robertson, J.
daughter and the only "legal heir" of the said William
George Robb, and as such is entitled to take under the
will of her grandfather, John Robb, set out in the state-
ment of claim; and I declare accordingly. The costs of all
parties to be paid out of the estate, as between solicitor
and client.

[QUEEN'S BENCH DIVISION.]

DANCEY V. GRAND TRUNK RAILWAY COMPANY ET AL.

Railways and railway companies—Contract—Passenger ticket—"Via direct line"—Authority of ticket agent—Meaningless condition.

When a railway company intrust an agent with the sale of their tickets, they clothe him with the apparent authority to explain to the purchasers of such tickets the purport or effect of any condition or provision thereon, which would be unintelligible without such explanation, and also their rights under such tickets, having regard to such provision or condition.

And where such an agent sold a ticket "via direct line" between two places, and there were three different routes between the places operated by the company, none of them being direct, and one of which was shorter than the others, and the agent in selling the ticket gave the purchaser to understand that he might travel under the ticket by any one of the three lines, and in doing so by one of the longer routes, he was forcibly ejected from the train for declining to pay an extra fare:—

Held, that the provision "via direct line" was unintelligible without explanation and that the company were bound by the representation of their agent in relation thereto:—

Held, also, that the words "via direct line" were inapplicable to the contract and must be struck out in construing it.

THIS was an action brought against the railway company Statement.
and a conductor and brakemen, to recover damages for
the unlawful and forcible ejection of the plaintiff from a
train of the defendants the railway company, and was tried
at the Autumn Sittings, 1890, of this Court at Goderich,
before MACMAHON, J., and a jury, who found a verdict in
favour of the plaintiff for \$1,000.

It appeared that the plaintiff purchased from an agent
of the defendant company authorized by them to sell pas-
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Statement. senger tickets on their account in the town of Goderich, on the 2nd September, 1889, a passenger ticket from Goderich to Sarnia and return. The return part of the ticket was produced at the trial, and was as follows :

“ GRAND TRUNK RAILWAY.

Good for one continuous passage not later than Oct. 1st, 1889.

Sarnia to Goderich.

First class.

Not transferable.

J. HICKSON, *General Manager*.

Via direct line unless otherwise endorsed.

Conductor will collect this ticket or exchange it for check Z. 4. 89.”

The ticket was printed with the exception of the name of the place to or from which it was required, and the time of the expiry, and the name “Sarnia,” and the date October 1st, —9, was written by the agent, to whom was paid \$5, the regular price for such a ticket. The counterpart of the ticket from Goderich to Sarnia was precisely similar except that it was from Goderich to Sarnia. There were three ways of going by rail from Goderich to Sarnia and return, *via* Lucan Crossing, *via* London, and *via* Stratford—that *via* Lucan Crossing being the shortest—all on lines operated or owned by the defendants the company, but none of them was in any sense direct, each route involving one or more changes. There were three passenger trains a day from Goderich to Sarnia, by the various routes, one at 7.05 a.m., one at 1.55 p.m., and one at 4.05 p.m. Passengers, however, were unable to reach Sarnia from Goderich the same day by taking any one of these trains. After certain hours they were restricted in order to reach their destination to a particular route, and by the first train only could they reach Sarnia by Clinton and Lucan Crossing, and by that train they could not conveniently take baggage, as at Lucan Crossing, where a change had to be made from that train, there was no provision for transfer by the company, and owing to the way the lines were built it was difficult,

if not impossible, for passengers to transfer their own baggage. Statement.

In his evidence the plaintiff was not certain as to the way he went from Goderich to Sarnia. On returning he took the train from Point Edward (near Sarnia) at 12.55 on 6th September, 1889. After the train left Point Edward the conductor went through the train examining the tickets, exchanging the plaintiff's for a check marked Z, and put in the plaintiff's hat another check on which was the baggage number of Lucan. After the train left Ailsa Craig, the station on the defendants' main line next before Lucan Crossing, the conductor again went through the train and took the check out of the plaintiff's hat, telling him to change cars at the next station, which the plaintiff took to mean Lucan Crossing. The train passed Lucan Crossing, and stopped at Lucan, the first station beyond Lucan Crossing, on leaving which place the conductor, seeing the plaintiff still on the train, told him he should have changed cars at Lucan, and that he must change cars at Granton, and go back to Lucan Crossing, or else pay his fare by Stratford. The plaintiff declined to do this, saying that the agent from whom he had purchased the ticket had told him that he could travel on it either by London or Stratford, to which the conductor replied that the ticket expressly said it was by the direct route unless otherwise endorsed. At Granton the plaintiff refusing to leave the train, or to pay the additional fare to Stratford, the conductor, with the assistance of the defendants Meyer and Graham, pulled the plaintiff off the train, using a good deal of violence, the defendant Meyer holding him down until the train had started again, when the plaintiff got on the train and paid the extra fare demanded, and was carried to Stratford, and thence to Goderich.

The jury found that the shortest way from Sarnia to Goderich was by way of Lucan Crossing and Clinton, but in answer to another question they found that the most direct route was the route that made the best connection, and that unnecessary violence was used in ejecting the

Statement. plaintiff from the train, and they assessed the damages at \$1,000.

The trial Judge thereupon directed that judgment should be entered for the plaintiff for \$1,000, with costs.

At the Michaelmas Sittings of the Divisional Court, 1890, the defendants moved to set aside the answers, the verdict, and the judgment, and to dismiss the action on the ground that, upon the answers of the jury and the undisputed facts of the case, the action should be dismissed, or that a judgment of nonsuit should be entered dismissing the action with costs, or dismissing the action so far as the defendant company and the defendant Graham were concerned, or for a new trial on the ground that the answers and verdict of the jury and judgment in plaintiff's favour in the action thereupon entered were contrary to law, evidence, and the weight of evidence, and the Judge's charge, and that plaintiff at the time of the occurrences complained of by him was not travelling from Sarnia to Goderich *via* direct line, or lawfully entitled to travel upon the train in question without payment of his proper fare as demanded from him by the company's conductor, and that no force was used in ejecting plaintiff from the train beyond that which it was absolutely necessary to use for that purpose, and on the ground that the damages were altogether excessive and unjust.

The motion was argued before ARMOUR, C.J., and STREET, J., on the 25th November, 1890.

Aylesworth, Q. C., for the defendants. The first question is, what were the plaintiff's rights under the written contract, the railway ticket? It is for the Court to construe that contract. It plainly says "*via* direct line." There was a road which was approximately the direct line, and which was at all events more direct than that which the plaintiff took. The jury answered that the shortest way was by way of Lucan Crossing and Clinton. The answer

of the jury that the way that makes the best connection is Argument.
the most direct way, is no answer at all. The word
“direct” is the converse of “circuitous;” it means “straight.”
It made no difference in time which of the roads the
plaintiff chose. There was no evidence except the plain-
tiff’s own of any unnecessary violence being used in
putting him off the train, and the finding of unnecessary
violence is against evidence. The damages are excessive;
\$1,000 is too much for a slightly bruised arm.

Lount, Q.C., (with him *M. G. Cameron*), for the plaintiff,
contra.

Aylesworth, in reply.

February 2, 1891. The judgment of the Court was
delivered by

ARMOUR, C. J.:—

The defendants’ counsel contended that the ticket sold
to the plaintiff was the contract between him and the
defendant company; that it was a term of the contract
that the plaintiff was to be carried from Goderich to Sarnia
and return “*via* direct line;” and that such “direct line”
was by way of Clinton, Lucan Crossing, and the main line
to Point Edward, and thence to Sarnia.

The words “*via* direct line,” must be taken to have the
same meaning on the “go” part of the ticket as on the
“return” part, and the same line must be taken to be
meant by these words on each part of the ticket.

These words were probably printed on all the return
tickets issued by the defendant company for sale at all
points on their railway system.

To journeys to and from certain points on their railway
system these words would be entirely applicable; to jour-
neys to and from other points upon their railway system
these words would be entirely inapplicable. To a journey
from Goderich to Sarnia and return they were entirely
inapplicable, for there was no “direct line” from Goderich
to Sarnia.

Judgment. In construing the contract between the plaintiff and the defendant company to carry him from Goderich to Sarnia and return, we must strike out these words "*vid direct line*," because they are inapplicable to the contract and meaningless: *Stewart v. Merchants' Marine Ins. Co.*, 16 Q.B.D. 619.

It was contended that because the line from Goderich to Clinton, thence to Lucan Crossing, thence by the main line to Point Edward, and thence to Sarnia, was the shortest line, it must be taken to be the "direct line" within the meaning of the contract, but we cannot so construe the contract without doing violence to the words used in it, and attributing to the words "direct line" a meaning which these words in themselves do not fairly bear, and when we consider the contract in the light of the surrounding circumstances, it is manifest that this line was not intended by the defendant company to come within the words "direct line," as used in the contract.

In the sale of tickets, such as that sold to the plaintiff, the defendant company did not restrict the sale of them to purchasers only who intended to make the journey without taking any baggage with them, but sold the tickets without reference to whether or not the purchasers intended to make the journey with or without baggage, and the defendant company made no provision for the transfer of baggage at Lucan Crossing, so that passengers with baggage could not be carried that way without transferring their own baggage.

In the sale of such tickets the defendant company did not restrict the purchasers to leaving Goderich by the 7.05 a.m. train, which was the only train by which they could go on any day to Sarnia by way of Clinton, Lucan Crossing, and Point Edward, nor did the defendant company confine the sale of such tickets to any particular time of the day, and a purchaser buying one of these tickets after 7.05 a.m. on any day and before 1.55 p.m. on that day, could go to Sarnia on that day only by way of Stratford or London, and buying one of these tickets after 1.55 p.m. and before 4.05 p.m. on that day, could go to Sarnia on that day only by way of London.

A reference to the time table of the defendant company, Judgment.
to the trains which were timed to stop at Lucan Crossing, Armour, C.J.
and to the times at which they were so timed to stop there,
and the fact that there was no regular station and station
staff provided by the defendant company at Lucan Cross-
ing, all go to shew that the line from Goderich to Sarnia
by way of Clinton, Lucan Crossing, and Point Edward was
not intended by the defendant company to come within
the words "direct line," as used in the contract.

The agent of the defendant company for the sale of these
tickets gave the purchasers to understand, and the plaintiff
among them, that these tickets entitled them to go and
return from Sarnia either by way of Clinton, Lucan Cross-
ing, and Point Edward, or by way of Stratford and Point
Edward, or by way of Clinton and London, and the evi-
dence shews that the right of such purchasers to so go and
return was always recognized and assented to until this
occurrence took place, and has been recognized and assented
to by the defendant company ever since.

It was contended that this agent had no authority to
make any such representation to the purchasers of these
tickets, but I do not agree with this contention, for I am
of opinion that if a railway company entrusts an agent
with the sale for them of tickets for their railway, they
clothe him with the apparent authority to explain to the
purchasers of such tickets, where such tickets contain some
provision or condition which would be unintelligible with-
out explanation, the purport and effect of such provision
or condition, and the rights to which they would be entitled
under such tickets, having regard to such provision or con-
dition : *Benson v. Ottawa Agricultural Ins. Co.*, 42 U. C.
R. 282 ; *Graham v. Ontario*, 14 O. R. 358.

I think the provision or condition in these return tickets
from Goderich to Sarnia is a provision or condition of this
character, unintelligible to purchasers without some expla-
nation, and perhaps it may yet be found to have been
unintelligible even to me.

If a person desiring to go to Lindsay went to the ticket
office of the defendant company at Toronto and bought a

Judgment. ticket for Lindsay with the words "via direct line," and **Armour, C.J.** if he asked the ticket seller what line he was to go by, and was told that he could go either by Blackwater or Whitby, and if, relying upon what he was told, he went by one and was expelled from the train or made to pay his fare over again because he did not go by the other, would he be without remedy because the ticket seller had no authority to tell him what the ticket meant? I think clearly not, and I am of opinion that the ticket seller would be clothed with the apparent authority of the defendant company to give him the required information, and he would be entitled to rely upon it, and such a case differs in no respect from this.

It is to be observed that the defendant company, while contending that the line from Goderich to Clinton, Lucan Crossing, and Point Edward was the "direct line" within the meaning of the contract, carried the plaintiff past Lucan Crossing, and did not stop there to let him get off, and it might well be contended that having carried him past Lucan Crossing they could not then demand fare from him and expel him from the train for nonpayment of it.

I am of the opinion, however, that the ticket purchased by the plaintiff entitled him to go to Sarnia and return either by way of Clinton, Lucan Crossing, and Point Edward, or by way of Stratford and Point Edward, or by way of Clinton and London; that the fare from Lucan to Stratford was illegally demanded from him; and that he was justified in refusing to pay it; that he was illegally expelled from the train; and that all the defendants are responsible for it.

The damages awarded are no doubt large, but besides the physical injury to the plaintiff, of the reality and extent of which the jury upon the evidence were the judges, the expulsion from a train in the manner the plaintiff was expelled is attended with a certain amount of ignominy and disgrace, and we cannot say, having regard to the principle laid down in *Praed v. Graham*, 24 Q. B. D. 53, that the award of the jury should be set aside.

The motion will, therefore, be dismissed with costs.

[COMMON PLEAS DIVISION.]

REGINA V. HART.

*Evidence—R. S. O. ch. 61, sec. 9—Conviction—Offences under by-law—
Admissibility of evidence of defendant.*

On the trial of an offence against a city by-law in the erection of a wooden building within the fire limits, the defendant is not either a competent or compellable witness; and, therefore, where in such a case, the defendant's evidence was received, and a conviction made against him, it was quashed with costs.

IN Michaelmas Sittings, November 20th, 1890, *Du Vernet* Statement. obtained an order *nisi* to quash a conviction made by James Woodyatt, police magistrate for the city of Brantford, whereby the defendant was convicted, in that he "did on the 16th day of December, 1889, unlawfully erect a wooden building on lot No. 1, on the south side of Albion street, in the said city of Brantford, being within the fire limits, contrary to certain by-laws of the municipality of the city of Brantford, in the said county of Brant: one passed on the 2nd day of June, 1879, and entitled "By-law No. 306;" another passed on the 31st day of May, 1886, and entitled 'By-law No. 380'; and another passed on the 14th day of March, 1887, entitled 'By-law No. 390,'" and a fine and costs imposed, on the ground, amongst others, that the evidence of the ownership, and erection of the building, and of its being erected within the time for prosecution, was supplied solely by the defendant's testimony; it being alleged that the offence was a crime, and that the defendant was not a competent and compellable witness.

IN Michaelmas Sittings of the Divisional Court, composed of GALT, C. J., and ROSE, J., November 29th, 1890, *Du Vernet* supported the motion.

Aylesworth, Q. C., contra.

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Judgment. February 3rd, 1891, ROSE, J. :—

Rose, J.

On the argument we overruled all objections to the conviction excepting the one raising the question as to whether the defendant was a competent or compellable witness, the evidence for the prosecution having been supplied solely by his testimony. The ground for objecting to his being called as a witness was that the offence was a crime.

Sec. 9, ch. 61 of R. S. O., is as follows:—"On the trial of any proceeding, matter or question under any Act of the Legislature of Ontario, or on the trial of any proceeding, matter or question before any justice of the peace, mayor or police magistrate, * * not being a crime, the party opposing or defending, or the wife or husband of the person opposing or defending, shall be competent and compellable to give evidence therein."

That section does not profess to make a party defending a competent or compellable witness on the trial of any proceeding matter or question, being a crime. I do not think there can be any reasonable doubt that the offence for which this conviction is had is a crime.

The cases are all collected and referred to in *Regina v. Dunning*, 14 O. R. 52.

In *Mellor v. Denham*, 5 Q. B. D. 467, Bramwell, L. J. said, at p. 469: "However, it is clear to my mind that the matter complained of is in truth a criminal offence: for it is disobedience to by-laws, which are enforceable as part of the law of the land, and a person guilty of disobedience to them is liable to a penalty. This is sufficient to constitute a criminal matter, and we have no jurisdiction to hear this appeal."

And in *The Queen v. Whitchurch*, 7 Q. B. D. 534, at p. 536, the same learned Judge, having before him for consideration a regulation regarding public health, not unlike in principle the one in question, said "When a nuisance exists and notice of it is given to the owner to abate it, he is bound to execute such works as may be neces-

sary for that purpose. When a notice to abate has been served under the Public Health Act 1875, sec. 94, the effect is the same as if the abatement had been directed by statute; the notice to abate is an act done for the common weal and benefit; and if no mode of enforcing it were pointed out by statute, disobedience to it would be a misdemeanour at common law punishable by fine and imprisonment; in this event the disobedience would be undoubtedly criminal. The procedure, however, is somewhat altered, and instead of being fined and imprisoned at the discretion of the Court, the offender is liable to be fined to a limited amount, and not to be imprisoned if he pays the fine. Why is not this proceeding under the Public Health Act, 1875, 'a criminal cause or matter' within the meaning of the Supreme Court of Judicature Act, 1873 sec. 47? It is certainly not a civil proceeding, and it may perhaps be said that every proceeding is either civil or criminal."

Judgment.
Rose, J.

In this decision Brett, L. J. and Cotton, L. J. concurred.

The whole matter was treated exhaustively by Lord Justice Brett as Master of the Rolls in *Attorney-General v. Bradlaugh*, 14 Q. B. D. 669, commencing at p. 686, and at pages 693 and 694 he refers to the above cited cases of *Mellor v. Denham*, and *Regina v. Whitchurch*.

At page 693 we find the learned Master of the Rolls saying "Now justices are not judges in civil cases as a rule. It is possible that in some cases they may have to decide a civil dispute, one which cannot be called criminal. But where they have to make orders for payment of money, most of those orders are for payment in respect of that which is considered to be within their jurisdiction as a police matter; and therefore where their order is for the payment of money, nevertheless if it is a police matter, or where their order is an alternative order, which the defendant in this case has shown is often in this form—that the defendant before the justices is to pay the penalty, and if he does not he is to go to prison—the matter is in point of truth *quasi* criminal, or a matter which is treated as a criminal matter within the jurisdiction of the justices; and in

Judgment. *Regina v. Whitchurch*, that is the very ground given as the reason why the matter although it is for a penalty, should be treated as a criminal matter in which there is no appeal."

Rose, J.

See also *Re Lucas and MacGlashan*, 29 U. C. R. 81; *Regina v. Roddy*, 41 U. C. R. 291, at p. 302 and Paley on Convictions, 6th ed., p. 118.

The sec. under which this by-law was passed is sub-sec. 10 of sec. 496, R.S.O. ch.184 (1887), the provisions of which are clearly for the benefit of the public and matters of police regulation, and do not give a right to any private individual, or any civil right, or any right which can be adjudicated in a court of civil jurisdiction only, but create an offence against the public which, according to sec. 421 of the same Act, is to be punished upon conviction by fine, which fine is to be collected by distress, and in default of distress, imprisonment.

I have no doubt, that such provisions are not provisions relating to a civil matter or proceeding, but relate solely to a criminal matter or proceeding and that an offence against the by-law passed under such statute is a crime.

Mr. Aylesworth urged that the Provincial Legislature has no power to create a new crime; and, if this offence is to be held to be a crime, all offences against municipal by-laws must be held to be crimes, and so beyond the jurisdiction of the Local Legislature.

If that be the result, it is only a further argument why this conviction cannot be sustained. We are not called upon to express any opinion upon the question. It has been discussed in *Regina v. Wason*, 17 A. R. 221 and the cases therein referred to.

It may well be that the Provincial Legislature has power to pass an enactment and affix certain sanctions, and that an offence against such an Act would be a crime punishable under the provisions of a Provincial criminal law: *Russell v. The Queen*, 7 App. Cas. 840, *Regina v. Wason*, at p. 243. The case of *Regina v. Wason*, decides that the enforcement of an enactment for the pro-

tection of private rights "is not a criminal enactment, although its provisions be enforceable by fine and imprisonment." That is not this case.

Judgment

Rose, J.

Reference was made on the argument to the case of *Regina v. Grant*, 18 O. R. 169, at p. 171. That case does not decide the point in question. It was not raised or considered. Sec. 424 of ch. 184 in terms makes a defendant a competent and compellable witness, and in a passing reference to such section I there said, "the first ground on the material before us appears well taken, R. S. O. 1887, ch. 184, sec. 424."

Further consideration makes it manifest that that section does not apply to prosecutions under by-laws, or for breach of by-laws, which are governed by sec. 426, but applies only when the hearing is of an "information or complaint exhibited or made under this Act," and this complaint is not under the Act but under a by-law. Sec. 426 casts us back upon sec. 9 of R. S. O. ch. 61 above referred to.

There is this peculiarity in the legislation. Sec. 420 provides for the recovery and enforcement of penalties "imposed by or under the authority of this Act." Section 424 declares who may be witnesses "upon the hearing of any information or complaint exhibited or made under this Act." Section 421 governs prosecutions "for an offence against a municipal by-law;" and by sec. 426 it is enacted that "In prosecuting under any by-law, or for the breach of any by-law, *witnesses* may be compelled to attend" etc. By sec. 421 authority is given to convict "on the oath or affirmation of any credible witness."

Neither sec. 421 nor 426 says anything about a defendant giving evidence; but sec. 426 says that "*witnesses* may be compelled to attend and give evidence in the same manner, and by the same process, as witnesses are compelled to attend and give evidence on summary proceedings before justices of the peace in cases tried summarily, under the statutes now in force, or which may be hereafter enacted." And sec. 9 of R. S. O. ch. 61 governs proceedings before justices of the peace.

Judgment.**Rose, J.**

There is an apparent conflict between sec. 429 and sec. 9, where prosecutions are for what may be called crimes under the Provincial Legislation; and if sec. 424 is to prevail in such cases, a defendant, in a prosecution under the Act, may be both a competent and compellable witness; while a defendant in a prosecution under a by-law, passed under the authority of the Act, may be neither competent nor compellable.

If there is any doubt as to the meaning of the words in sec. 9 "not being a crime," I think we should give the widest meaning to such words; that is to say, until the Legislature by express terms repeals the old law, we should not hold that a party accused of a crime, whether it may be called a crime under Imperial or Dominion legislation or a crime of lesser magnitude under Provincial legislation, is either a competent or compellable witness.

Indeed the opening words of sec. 9 seem to imply that there may be a trial of a proceeding, matter or question under an Act of the Legislature of Ontario, which proceeding, etc., may be a crime.

The result is that, in my opinion, the defendant was not either a competent or compellable witness; and, therefore, the conviction must be quashed.

As this is a contest between the defendant and the municipality, I see no reason why the defendant should not have his costs against the complainant. The usual order for protection may go.

GALT, C. J., concurred.

[COMMON PLEAS DIVISION.]

MILLAR V. McTAGGART.

Fraudulent transfer of goods—Action to set aside—Joinder of action for recovery of penalty—Notes, goods, and chattels—Evidence—Privilege—13 Eliz. ch. 5, sec. 3.

An action by the party aggrieved to recover the moiety of the penalty imposed by sec. 3 of 13 Eliz. ch. 5, may be joined with an action to set aside a fraudulent transfer under that Act, in this case the transfer of certain promissory notes.

Bills and notes are, by virtue of the legislation passed since 13 Eliz. goods and chattels within that Act.

Sec. 28 of the R. S. C. ch. 173, only applies to the concluding part of said sec. 3, namely that relating to imprisonment on conviction, etc.

Where a defendant at the trial raises no claim of privilege, if any such exists, to his being examined in support of a claim for the recovery of the penalty under the statute of Elizabeth, such claim cannot afterwards be set up on appeal to the Divisional Court.

THIS was an action to have declared void the transfer of **Statement.** two promissory notes under 13 Eliz. ch. 5, sec. 3.

The action was tried before Armour, C. J., without a jury, at Toronto; on the 9th October 1890.

The notes were made by one Stewart in favour of the defendant McTaggart, by whom they were endorsed to the defendant Brown. The plaintiff, who was a judgment creditor of McTaggart, claimed to have the transfer of the notes set aside as fraudulent and void within the 13 Eliz. The notes were not negotiable.

The learned Chief Justice found the facts necessary to entitle the plaintiff to such relief.

The plaintiff also asked to have the penalty under that section of the statute against all the defendants; but the learned Chief Justice refused the application in the following words: "I do not think that a *qui tam* action to recover a penalty imposed by 13 Eliz. ch. 5, sec. 3, can be joined with an action to set aside the transfer; and I strike out so much of the statement of claim as may be said to be for the recovery of the penalty, without prejudice to any other *qui tam* action that may be brought."

Argument.

In Michaelmas Sittings *H. D. Gamble* moved on notice to set aside the judgment of the learned Chief Justice, so far as regards his finding as to the claim to recover the penalty.

In the same Sittings, November 27th, 1890, *Gamble*, supported the motion. The question is whether an action for the recovery of the penalty prescribed by the statute can be joined with the action to set aside the transfer. The causes of action can certainly be joined. This is just such a case as the O. J. Act is intended to cover. The O. J. Act permits all causes of action to be joined, except actions for the recovery of land; and even these can be joined by a Judge's order when it is deemed advisable to do so. It is not necessary to state that the plaintiff sues on behalf of Her Majesty, unless there has been a contempt of the Queen: *Chitty on Pleading*, 7th ed., 386; *Meux v. Howell*, 4 East 1; *Butcher v. Harrison*, 4 B. & Ad. 129. The object of pressing the motion is to recover against Brown.

J. Mercer, contra. The forfeiture provided for by sec. 3 of the statute of Elizabeth, is of goods and chattels, and bills and notes were not goods and chattels within that Act: *Delves qui tam v. Strange*, 6 T. R. 158; *Robertson qui tam v. Orchard*, 4 P. R. 23. Moreover sec. 3 of the statute of Elizabeth is not in force in this Province, the Dominion Parliament having by sec. 28 of the R. S. C. ch. 173 incorporated the section in the criminal law with a different punishment, which has the effect of annulling the civil remedy given by the statute of Elizabeth: *Maxwell on Statutes*, 253. There is no foundation in law for a *qui tam* action on the facts declared here: *May on Fraudulent Conveyances*, 2nd ed., 528. Assuming however that the causes of action can be tried together, the learned Judge at the trial has under Con. Rule 346 a discretionary power to say whether, he will try the two causes of action together, and having exercised his discretion the Court cannot interfere: *Ruston v. Tobin*, 10 Ch. D. 558; R. S. C. ch. 180, sec. 1.

Gamble, in reply. Bills and notes now come within the Argument. Act, as they are constituted goods and chattels, and exigible under execution. Sec. 28 of the R. S. C. ch. 173 does not apply here as this is not a criminal but a civil remedy: *Atcheson v. Everitt*, 1 Cowp. 382.

February 14th, 1891. ROSE, J. :—

The whole of the practice and procedure has been discussed in *Bagley qui tam v. Curtis*, 15 C. P. 366, and *Drake qui tam v. Preston*, 34 U. C. R. 257.

Without deciding the point, it may, although I am not sure that it would, be inconvenient to join a claim *qui tam* with other claims in one action unless the plaintiff were the party grieved as here, and not a common informer.

The authorities show, I think, that the party grieved, and indeed a common informer, might sue in his own name, unless there has been a contempt of the King, which there has not been in this case.

In 2 Hawkins Pleas of the Crown, ch. 26, sec. 17, p. 369. "high contempt of the King" is illustrated as follows: "As where a Judge refuses to allow the benefit of the King's pardon to a prisoner, unless he will give him such a bribe; or where one makes a rescous of one taken on a *capias utlagatum*, at the suit of the party, or the sheriff suffers one taken on such a *capias* to escape."

In that chapter the law as to the form of action and right of recovery is laid down; and the subsequent authorities, as far as I have been able to note them, have followed the principles there laid down. The language of this Act is somewhat different from some other statutes, and is fairly open to the construction that two several actions are given, one to the Crown and one to the party grieved.

The section is set out and discussed in the second edition of May on Fraudulent Conveyances, Black ed., sec. 537, where it is declared that all and every the parties to a forbidden transaction shall incur the penalty of a forfeiture, amongst other things, of "the whole value of the said goods

Judgment.
Ross, J.

and chattels * * one moiety to be to the Crown and the other to the parties grieved by such feigned and fraudulent feoffment, etc., to be recovered in a court of record by action of debt, bill, plaint, or information, etc."

Having regard to the authorities cited and those therein referred to, especially *Frederick v. Lookup*, 4 Burr. 2018, I am of the opinion that the plaintiff was not bound to sue *qui tam*, and that he was entitled to enter an action in his own name, recover and receive his own moiety of the penalty.

See cases cited in argument by Armour, Q. C., in *Drake qui tam v. Preston*, 34 U. C. R., at p. 260.

The plaintiff did not here sue *qui tam*, but in the claim asked that the defendants and each of them might be ordered to pay to the Queen and the plaintiff as a penalty and forfeiture, for making the fraudulent transfers, the sum of \$700, being the amount of the promissory notes transferred.

The portion of the paragraph asking for an order on the defendant to pay the Queen her share of the penalty may be struck out, as there has been no contempt. See *Bagley qui tam v. Curtis*, 15 C. P., at p. 368.

There seems, therefore, no reason why a claim by a party grieved might not well be joined with a claim to have the transfer declared void. Indeed, it seems to me that it is highly convenient that it should be so joined, for it would not be in accordance with the spirit of recent legislation that the same facts should be considered in two separate actions because two remedies are given by the statute upon such state of facts.

Here the learned Chief Justice had before him all the facts, and, upon his finding, which entitled the plaintiff to have the transfer set aside, the plaintiff is by the same section entitled to recover the penalty, unless some valid objection exists to such recovery. As far as the facts are concerned no new enquiry is necessary to enable the plaintiff to recover except to measure the amount of penalty or forfeiture to be recovered, which enquiry will

also determine whether the plaintiff has been grieved or injured. Even had any technical objection existed to the joining of such claims in one action the objection came too late. *Re Derbon*, 58 L. T. N. S. 519, *Mulckern v. Deorks*, 51 L. T. N. S. 429.

Judgment.
Rose, J.

Mr. Mercer objected that as the recovery was had upon the defendants' evidence such evidence could not be used against them to recover the penalty; but the defendants did not claim privilege even if the privilege existed. As to this see *May on Fraudulent Conveyances*, sec. 540.

The next objection was that the section of the statute relied upon was not in force in this country although introduced in 1792, because the Dominion Parliament by R. S. C. ch. 173, sec. 28 had incorporated the provision of the section in the Criminal Law with a different punishment.

As far as this objection has force it only applies to the concluding words of the section, to wit, and the offender "being thereof lawfully convicted shall suffer imprisonment for one half year without bail or mainprise." See *May on Fraudulent Conveyances*, pp. 225, 226, 496, 499.

A further objection was that notes were not goods and chattels within the meaning of the statute. This was so at the time of the passing of the Act, because then they were not exigible in execution, but as soon as they were made subject to execution then they came within the provisions of the Act. See *Regina v. Smith*, L. R. 1 C. C. 266, at p. 270, per Bovill C. J., where the learned Chief Justice says that the earlier statute dealt with the genus within which a new species was brought by a subsequent Act. See also *Norcutt v. Dodd*, 1 Cr. & Ph. p. 100.

The notes in question were not negotiable. They were made in favour of McTaggart, the judgment debtor, by whom they were transferred to the defendant Brown. McTaggart endorsed them to Brown. The result was that Brown was, as between himself and McTaggart, entitled to collect the amount of the notes from Stewart, and, if necessary, to sue for recovery in McTaggart's name. So the case came clearly within the statute.

Judgment.

Rose, J.

The real difficulty in the plaintiff's way is that he is not entitled to recover the face value of the notes, but is only entitled to recover a moiety of the actual value. I suppose that means the value at the time of transfer. See *Butcher v. Harrison*, 4 B. & Ad. 129. On the argument Mr. Gamble for the plaintiff said, that his object in pressing his motion was to reach Brown as the only solvent defendant, at least I so understood him. If this was the financial position at the time of the transfer then the notes were of no real value, and so the plaintiff was not grieved by the fraudulent transfer and suffered no damage.

The plaintiff may have a reference to ascertain such value but it will be at his own risk if it turn out that this motion, though successful in form, has no substance in it. If a reference is desired further directions and subsequent costs, including costs of this motion, will be reserved. If the plaintiff do not desire a reference then the motion may be dismissed without costs.

GALT, C. J., concurred.

[COMMON PLEAS DIVISION.]

HOPE V. GRANT.

Fraudulent preference—R. S. O. ch. 124, sec. 2—Surety, before payment by him not a creditor.

To avoid a transfer as a fraudulent preference under R. S. O. ch. 124, sec. 2, the person to whom it is made must be a creditor in respect of the transaction attacked; and a surety for an insolvent who has not paid the debt for which he is surety, is not a creditor within the meaning of the Act.

THIS was an action brought by an assignee for creditors *Statement.* to recover the amount of two promissory notes which were alleged to have been given to the defendant on account of the insolvent under such circumstances as, and with the intention to, give him a preference over other creditors.

The facts sufficiently appear in the judgment.

The cause was tried before STREET, J., without a jury, at Belleville, at the Autumn Assizes of 1890.

The learned Judge reserved his decision, and subsequently delivered the following judgment :

October 17, 1890. STREET, J.:—

In this action, the plaintiff, as assignee for the creditors of George Grant, sought to recover from the defendant James Grant, \$1,000, being the amount of two promissory notes received by him shortly before the assignment, upon the ground that the delivery of them to him was a preference, or that it was made with intent to defeat or prejudice creditors.

John Grant, a brother of the insolvent, and also a brother of the defendant James Grant, had carried on business at Belleville in the name of the insolvent. The defendant had lent the business \$1,000, and had endorsed notes made by John, as attorney for George, which were discounted with a bank for the purposes of the business. One of these notes, amounting to \$1,400, became due on 17th December,

Judgment. 1889, at the Bank of Montreal, in Belleville. George Grant
Street, J. had quarrelled with his brothers before this, and had threatened to leave his brother James to pay this note. A few days before it matured, John Grant obtained from one Hawley, who was indebted to the business in \$1,000, two promissory notes for \$500 each, which he then took to the bank and proposed to discount them and apply the proceeds upon the \$1,400 note in order to save James from so much of his liability. The bank manager refused to discount them because of the long date at which they were payable, but offered to discount James Grant's note for \$1,000 with the two \$500 notes as collateral. Two or three days afterwards John and James Grant went together to the bank with a lawyer. John handed to James the two \$500 notes, and James made his note for \$1,000, which the manager discounted, taking the others as collateral. James drew the proceeds and gave a cheque for the amount to John, who deposited it to the credit of George's account: then James made a note for \$400, endorsed by his sister Mrs. Davey, and handed it to John who had it discounted on George's account. The proceeds of these two transactions were then devoted to taking up the \$1,400 note which James had endorsed for the business as above mentioned. The two \$500 notes were paid to the bank at maturity, and were applied in payment of James' \$1,000 note. He paid the \$400, when it became due. George made an assignment for the benefit of his creditors on 24th December, 1889, three or four days after the retirement of the \$1,400 note. In carrying out the transaction John acted for George under a power of attorney which was in full force. George himself was in ignorance of the transaction until after its completion.

The action is brought to recover from James the \$1,000, the amount of the two notes which he received from John under the circumstances above mentioned.

At the close of the trial I found that George Grant was insolvent at the time the notes were handed over to James, and that James was aware of the insolvency at the time

he took them : that John also knew of the insolvency, and intended to protect James from his liability by handing over to him the notes in question; and I reserved the question as to whether the transaction was avoided by R. S. O. ch. 124, sec. 2.

Judgment.

Street, J.

I am of opinion, under the circumstances, that the plaintiff is not entitled to recover.

I cannot find that there was any intent on the part of either John or James to defeat, delay or prejudice the creditors of George. The transaction, no doubt, had the effect of prejudicing his creditors by reducing the assets of his estate, but it was decided by the Court of Appeal in *Molsons Bank v. Halter*, 16 A. R. 323, that the words "or which has such effect," in section 2 of the Act, only apply to the provision against preferences, and not to the preceding provision, as to which therefore the intention and not the effect must still govern.

Nor can I find that either the intention or the effect of what was done was to give a preference to a creditor within the meaning of the Act. The payment to the bank of the proceeds of the discount of the \$1,000 note was not a preference which can be attacked, because payments of money to a creditor are protected by section 3; and it was not a preference of James because he was not a creditor in respect of the transaction which is attacked. At the time he received the notes in question James Grant was accommodation endorser for the insolvent upon a note which was overdue, but which he had not paid. His legal position was therefore that of a surety for the insolvent, and not that of a creditor. I have been referred to no authority, nor have I been able to find one, upon this Act or any similar one, extending the meaning of the simple description of creditor so far as to include a surety who has not paid the debt for which he was liable. The decisions under our former Insolvent Acts are of no assistance upon the point, because the interpretation clause in those Acts undoubtedly extends the meaning of the word "creditor" so as to cover a surety for the insolvent.

Judgment. It has been over and over again said that, apart from the statutes which make preferences void, there is no fraud in the mere act of paying one creditor before another; such a preference is a mere statutory wrong, and should, therefore, I think, not be treated as a wrong unless it clearly comes within the words of the statute relied upon as making it so. See *Ex p. Stubbins*, 17 Ch. D. 58, at p. 65; *May on Fraudulent Conveyances*, 2nd ed., p. 104; 2 *Bigelow on Fraud*, ed. of 1890, p. 577; *Ex p. Taylor*, 18 Q. B. D. 295.

Street, J.

It is true that James Grant was a creditor of George Grant in respect of the original advance of \$1,000 which he had advanced to the business and which had not been repaid to him, but that can, I think, make no difference, because the alleged preference had no connection with that debt. The transaction here attacked was a distinct and isolated one; the notes were given to James for a particular purpose which was carried out, and the fact that James was a creditor in respect of another distinct and isolated transaction, cannot affect the rights of the parties in the other one. See, upon this point, *Ex p. Taylor*, 18 Q. B. D. 295.

I think the action should be dismissed with costs.

A motion was made on behalf of the plaintiff to set aside the judgment, and to have the same entered in the favour of the plaintiff.

In Michaelmas Sittings, December 2, 1890, Clute, Q.C., supported the motion (before a Divisional Court composed of GALT, C. J., and ROSE, J.) and referred to *Ex p. Taylor*, *In re Goldsmid*, 18 Q. B. D. 295; *Molsons Bank v. Halter*, 16 A. R. 323; *Ashley v. Brown*, 17 A. R. 500; *Cameron v. Cusack*, 17 A. R. 489; *Johnson v. Hope*, 17 A. R. 10.

Lount, Q. C., contra.

January 5, 1891. GALT, C. J.:—

Judgment

Galt, C.J.

It is true the defendant was a creditor of the insolvent, having lent him a certain sum of money, but the transaction complained of had nothing to do with that loan.

The insolvent, George Grant, was nominally the owner of a business in Belleville as a dealer in boots and shoes. The business really belonged to his brother John. The defendant James was also a brother, but had nothing to do with the business, his occupation being that of a bridge inspector of the Grand Trunk Railway. In order to assist his brothers he was in the habit of signing blank promissory notes which were used in their business. According to his evidence, and also that of John Grant, he was under the impression that these notes were used for a sum not exceeding \$500 or \$600.

On the 11th December, 1889, John Grant, acting as attorney for George Grant (although this was without the knowledge of George Grant) discounted a note with the Bank of Montreal nominally made by the defendant and endorsed by a sister named Mrs. Davey, for \$1,400, payable three days after date. Sometime before this John Grant had made a sale of a stock of goods to one Starkey.

I will now quote from the judgment of the learned Judge who sums up the evidence as follows:

"A few days before it" (the \$1,400 note) "matured, John Grant obtained from one Hawley, who was indebted to the business in \$1,000, two promissory notes for \$500 each, which he then took to the bank and proposed to discount them and apply the proceeds upon the \$1,400 note in order to save James from so much of his liability. The bank manager refused to discount them because of the long date at which they were payable, but offered to discount James Grant's note for \$1,000 with the two \$500 notes as collateral. Two or three days afterwards John and James Grant went together to the bank with a lawyer. John handed to James the two \$500 notes, and James made his note for \$1,000, which the manager discounted, taking the others as collateral: James drew the proceeds and gave a cheque for the amount to John."

The proceeds of this cheque were deposited to George's account and applied to retire the \$1,400 note. This is the subject of the present action.

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Judgment.

Galt, C.J.

The learned Judge in his considered judgment, states: "I have been referred to no authority, nor have I been able to find one, upon this Act, or any similar one, extending the meaning of the simple description of creditor, so far as to include a surety who has not paid the debt for which he was liable."

There can be no question that as between the defendant and the insolvent the defendant was a surety, although on the face of the note he appears to be a maker; and it is manifest from the evidence of John Grant, by whom the note was filled in and discounted, that in doing so he had been guilty of a gross breach of trust as respects his brother. This being the case, it was most natural that John should have been desirous, as far as lay in his power, to relieve his brother.

It appears to me the case of *Ex p. Stubbins*, 17 Ch. D. 58, is in point. That was a case in which a trustee had been guilty of a breach of trust, and applied to his co-trustee to become the purchaser of a quantity of goods in order that the proceeds might be applied to refund the money he had improperly misapplied. Here James Grant had entrusted his brother John, who was the real owner of the business, with blank notes, on the understanding that they were not to be used for a larger sum than \$500 or \$600. John had very improperly filled in one at three days for \$1,400.

James, L. J., says at p. 69: "It is impossible to bring such a transaction within the doctrine of voluntary preference of a creditor. In order to do that there must be a payment or a transfer of goods by a debtor to a creditor, or to somebody in trust for a creditor. Here the creditor was the trust estate, if it could be called a creditor at all. If a debtor on the eve of insolvency, and just before he became bankrupt, sells goods in order that he may restore money which he has stolen from his master or from anybody else, and does return the money, it seems to me impossible to hold that such a payment can be treated as a fraudulent preference of a creditor."

In the present case the agent of the insolvent had improperly used the name of the defendant as maker of a promissory note, and in order to retire that note he had procured from a debtor of the firm two notes of \$500 each, to be applied towards the note, and being unable to do so, himself had handed them to the person whose name had been improperly used, that the same might be so applied.

Judgment.

Galt, C.J.

Under these circumstances I am of opinion, with my learned brother Street, that this motion should be dismissed with costs, as at the time the transfer was made it was made to the defendant as a surety and not as a creditor.

ROSE, J. :—

As it seems to me the transaction was in fact as follows: John Grant borrowed from the bank money for which he gave as security the note of his brother James endorsed by himself. As between John Grant and the bank, the form was the discounting of a note made by James Grant; but as between John and James, John, as the debtor of the bank obtained the money from the bank, and James was the surety, having no interest in the transaction, and deriving no benefit from it. When this note came due, it is clear that if John had taken the notes for \$500 each, referred to in the judgment of the learned Chief Justice, to the bank and discounted them, and with the proceeds retired the \$1,400 note, no action could have been brought against James to make him pay into the estate the amount of such a note; nor could the amount of the notes have been recovered from the bank.

In *Ex p. Stubbins*, 17 Ch. D. 58, at p. 68, Lord Justice James says: "But it was pressed upon us that the order of the County Court Judge could be sustained on the ground that the sale itself was a fraudulent transfer, that is, that the transfer of goods to a purchaser for value with the view of using the purchase money for a voluntary preference, the purchaser knowing this intention, was a fraudulent conveyance or transfer within the meaning

Judgment. of the 6th section of the Act. It appears to me that that
Rose, J. view cannot be sustained."

But whatever may have been the rights of the creditors against the bank, and it is perhaps not necessary to consider them, it is clear that on such a transaction no money would have been paid to James, no profit received by him, and he would have received no benefit of which he could have been deprived. Does the transaction in fact differ from the one above suggested? The two \$500 notes were transferred to the bank. It is true the form was the discounting of a note of James for \$1,000, with the two \$500 notes as collateral; but these notes became the property of the bank, and the makers liable to pay the amount thereof to the bank, and the proceeds derived from the transaction were not paid to James, but were applied by the bank in discharging a debt owing by John to the bank, and for which James was merely surety.

In *Federal Bank v. Harrison*, 10 P. R. 273, I endeavoured to collect from the authorities the law as to the right of a surety to compel a creditor to require the debtor to pay the secured debt, and came to the conclusion that the only remedy the surety had, apart from paying the debt and bringing an action against the debtor, was to bring an action to compel the creditor, upon being properly indemnified, to take such proceedings against the debtor as might be necessary to protect the surety.

In *Cockburn v. Sylvester*, 1 A. R. 471, it was held, reversing the judgment of the Common Pleas 27 C. P. p. 34, and thereby *Re Coleman*, 36 U. C. R. 559, that a surety was not a creditor until he paid the debt.

To quote from the judgment of Mr. Justice Burton, p. 476: "It was not a debt coming within the definition of *debitum in presenti solvendum in futuro*, nor a debt upon a contingency; it was not a debt at all, although it was quite possible, as the result shews, that a debt might arise from the plaintiff's granting the acceptance, and being afterwards compelled to pay it."

Mr. Justice Patterson, at p. 477, said : " I agree that it is impossible to hold that a debt was contracted from Coleman to the plaintiff. No actual debt could arise out of the transaction until the plaintiff had paid the bills or some part of them."

Judgment.

Rose, J.

Mr. Justice Burton also said : " But it was not a debt until default; and it was quite possible that no debt would ever arise; nor could the plaintiff accelerate the liability of Coleman by payment before maturity. If he paid previously, being under no legal obligation to pay, it would have been a voluntary payment, and would have afforded no ground of action against Coleman."

Assuming that the surety was not a creditor, then it seems to me that the whole case may be summed up in the words of Mr. Justice Osler in *Ashley v. Brown*, 17 A. R. 500, at p. 503 : " If the defendant was not a creditor he must, in order to avoid the transaction, rely upon the Statute of Elizabeth and prove that it was devised and contrived to delay, hinder, and defraud him. It is clear, however, that at the most, it was a preference only, which is not avoided by that statute." And the same learned Judge said to the like effect in *Molsons Bank v. Halter*, 16 A. R. 323, at p. 331. And assuming that James Grant was a creditor, I do not think the claim is valid.

In *Johnson v. Hope*, 17 A. R. 10, at p. 14, Mr. Justice MacLennan said : " The statute expressly permits an embarrassed debtor to prefer any one or more creditors, by payment in money, and that is what was done here. He borrowed from the plaintiff, and as the jury has found, the lender paid the money, at his request, to the creditors, and it is the same as if he had paid them the money himself."

As I have said, it seems to me that the real transaction here was the borrowing by John from the bank of the money to pay the note, for payment of which James was surety, and the giving of the two customer's notes as security. That James became surety for the payment of these notes, cannot, I think, make any difference.

Judgment.

Boyd, C.

We were asked to reserve judgment until the giving of judgment in the Supreme Court in *Molsons Bank v. Halter*, (a). Judgment has been delivered, dismissing the appeal. At present we are not fully advised as to the grounds upon which the judgment is rested, but in the view we have taken, it is not necessary to further delay the giving of judgment.

I cannot accede to the argument advanced by Mr. Clute, that because James Grant was a creditor of the estate in respect to other transactions that he was a creditor within the clause referred to in the statute in respect to this transaction.

I agree that the motion must be dismissed with costs.

(a) Since reported in 18 S. C. R. 83.

[COMMON PLEAS DIVISION.]

REGINA V. EXCELL.

Intoxicating liquors—Liquor License Act—Conviction—Fee for drawing up—Right to charge—Witnesses reading over and signing evidence—Maxim, omnia præsumuntur, etc.

Under the power conferred on justices of the peace by sec. 2 of R. S. O. ch. 74, to order in and by the conviction the payment of reasonable costs, a charge of fifty cents for drawing up a conviction under the Liquor License Act, is authorized.

On motion to quash a conviction, it was objected that the evidence taken before the magistrates and returned by them, was not shewn to have been read over and signed by the witnesses :—

Held, that the maxim *omnia præsumuntur esse rite acta* applied, and as the contrary was not shown it would be presumed to have been done.

THIS was a motion to quash a conviction against one **Statement.** James P. Excell, for unlawfully selling intoxicating liquor without a license, contrary to the provisions of the "Liquor License Act" of Ontario, R. S. O. ch. 194, sec. 49, on the grounds (1) that the witnesses were not competent, through lack of visual perception, to testify to the transaction sought to be proved; (2) that the defendant was improperly called upon to speak at the trial to enable the witnesses to identify him; (3) that the evidence should appear by the record to have been read over to the witnesses; (4) that the witnesses being marksmen, as well as being blind, the usual certificate required with an affidavit made by such should be appended to their evidence; (5) that the fee of fifty cents for the conviction was unauthorized.

The defendant in his affidavit stated that he held the office of alderman for the city of Brantford.

In Michaelmas Sittings, December 8, 1890, of the Divisional Court, (composed of GALT, C. J., and ROSE, J.,) *V. Mackenzie Q. C.*, supported the motion.

Wilkes, Q. C., contra.

Judgment. December 20, 1890. ROSE, J. :—

Rose, J.

The parties to whom the liquor was sold were three blind men attending the Institute for the Blind at Brantford. The right of appeal in such cases has been taken away by sec. 14 of 53 Vict. ch. 56 (O.), which limits the right of appeal to cases "where the person convicted is a licensee, or the conviction is for any offence committed on or with respect to premises licensed" under the "Liquor License Act." The right to *certiorari* however has not been interfered with. If the defendant is guilty, as we must assume him to be, he deserves no consideration. It is perhaps fair to him to say that in his affidavit filed on the motion for the *certiorari* he denies his guilt.

Three grounds were argued before us. The first was that there was an excess of fees charged, and by the conviction ordered to be paid, the item being the sum of fifty cents charged for the conviction. The fact is made to appear by the affidavit of the defendant who states "Exhibits marked A and B in this matter are true copies respectively of the conviction and the costs of the conviction, being the items thereof mentioned in such conviction." And in Exhibit "B" we find the word "conviction", and the charge made opposite thereto fifty cents.

Mr. Wilkes did not contend that this did not state the fact.

Mr. Mackenzie further stated that the magistrates were accustomed in every bill of costs to insert a similar item; and it was desired to have a ruling as to the correctness of the charge.

The item in the tariff under which the charge was justified is found in ch. 78 of R. S. O. schedule, item 10, and reads as follows: "For making up every record of conviction where the same is ordered to be returned to the Sessions, or on *certiorari*, \$1."

The next item is number 11, and refers to cases where no higher penalty than \$20 can be imposed; but I imagine, although it is not necessary for this case to decide that,

that item should be included under the head of number 10, and not made a separate item. I call attention to this as my attention has been drawn to the item by the high constable of this county who says that the indefinite language used has occasioned some doubt as to the proper construction to be placed upon the item. Reference to 52 Vict. ch. 45, (D.), which introduces the tariff of fees to be taken under the "Summary Convictions Act," will shew that both these charges are covered under one head.

Judgment.

Rose, J.

I think it is clear that the section only requires the conviction to be returned in cases in which an appeal lies, and as an appeal does not lie in the present case there would be no warrant for making a charge under item 10 as for a record of conviction ordered to be returned to the Sessions.

I do not think that R. S. O. ch. 76, which was relied upon by Mr. Wilkes, applies. That does not require a return of the conviction, but only a return of the list of convictions; but that merely means that particulars of the convictions shall be returned according to the form of return given by the statute. See similar section: R. S. C. ch 178, sec. 99.

It is clear that the charge could not be made up and included in the conviction as for a record of conviction ordered to be returned on *certiorari*, as the magistrate could not, at the time of the conviction, tell whether or not a *certiorari* would be applied for or ordered. The charges therefore provided for by item 10 of the tariff are charges which must be made and collected at the time the work is done; that is, at the time the return of the sessions or to the Court under the *certiorari* is asked for. If no convenient mode of recovery has been provided it will be a matter for legislation; but I certainly think that such charges cannot be included in an order of conviction.

But this does not dispose of the question. By R. S. O. ch. 74 the procedure before the justices in this and similar cases for a penalty or punishment imposed under the authority of any statute of the Province of Ontario is directed to be like the procedure provided by the statutes of the Dominion of Canada for similar proceedings before

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Rose, J.

justices. Sec. 1 of that Act, however, which makes such provision does not provide that the tariff of fees shall be governed by any legislation of the Dominion; but section 2 provides that the presiding magistrate, "may, in his discretion, award and order, in and by the conviction or order, that the defendant shall pay to the prosecutor or complainant, such costs as to the" magistrate "seems reasonable in that behalf, the same not being inconsistent with the fees established by law to be taken on proceedings had by and before justices of the peace."

By section 53 of R. S. C. ch. 178, a justice is required to make a minute of conviction, for which no fee is allowed; and he is further required to draw up a conviction, or order, on parchment or paper, under his own hand and seal, in the form provided by the statute. It is not said that he shall not charge a fee; and, as he is required to do the work, it is reasonable that he should be allowed a fee therefor. I think, therefore, that as the magistrate in this case was required to draw up an order of conviction, he was justified, under sec. 2 of R. S. O., ch. 74, in ordering the defendant to pay a reasonable sum therefor; and I think fifty cents was reasonable.

I am of the opinion that sec. 2 of 52 Vict. ch. 45, (D.), which introduces a tariff under the "Summary Convictions Act," does not apply for the reasons I have above given. By that section the fees mentioned in the tariff, and no others, are directed to be and constitute the fees to be taken on proceedings before justices under the "Summary Convictions Act." By R. S. O., ch. 78 the fees mentioned in the schedule and no others are directed to constitute the fees to be taken by the justices, "for the duties and services therein mentioned." The drawing up of a conviction is not mentioned in the schedule to that Act; and therefore the charge is not a prohibited one.

I think that objection fails.

The next objection argued was that it did not appear that the evidence was read over to the witnesses. It was urged by Mr. Wilkes that there is no provision requiring

that the evidence should be taken down in writing, and no section of the statute was cited which gave any such direction. The taking of evidence in writing is certainly proper, and the omission would, I think, be improper. See as to this Paley on Convictions, 6th ed., p. 122. But, even if there were an express provision, requiring that the evidence should be taken down in writing and read over to the witnesses, it does not appear that that was not done. Mr. Wilkes informs us that, as a fact, it was done, and I think that this is one of the cases where the maxim *omnia presumuntur esse rite acta* applies. See Broom's Legal Maxims, 6th ed., p. 906, where it is said "The rule, therefore, may be stated to be that where it appears upon the face of the proceedings that the inferior Court has jurisdiction, it will be intended that the proceedings are regular."

Judgment.
Rose, J.

The third ground suggested, but not argued, was that some irregularity took place in the proceedings by the witnesses who were blind being assisted in identifying the defendant by his being required to speak out loud so as to enable the witnesses to hear his voice. There is nothing before us, showing that this was done, and the defendant himself admitted that these witnesses had been in his place of business.

I think that the motion fails and must be dismissed with costs.

GALT, C. J., concurred.

[COMMON PLEAS DIVISION.]

REGINA v. FLYNN.

Intoxicating liquors—Liquor License Act—Conviction—Absence of distress clause—Amending conviction—Evidence of defendant being licensed—Statement by witnesses unchallenged.

In a conviction under sec. 73 of the Liquor License Act, R. S. O. ch. 194, for delivering liquor to a person while intoxicated, imprisonment was directed without any provision for distress. On the conviction being brought before the Court on *certiorari*, the Court under sec. 87 of the Summary Conviction Acts, R. S. C. ch. 178, as amended by sec. 27 of 53 Vict. ch. 37, (D.), amended the conviction by inserting a provision for distress.

The amending Act came into force after the conviction was made and *certiorari* granted, but it being a matter of procedure, the Court had power to act under it and make the amendment.

In proof of defendant being a licensed hotel keeper under the Act, a witness in giving evidence, stated defendant to be such, and although defendant was present and represented by counsel, he allowed the statement to pass unchallenged :—

Hell, sufficient, as the witness might have obtained his information from the defendant.

Statement.

THIS was a motion to make absolute an order *nisi* to quash a conviction under sec. 73 of the "Liquor License Act" of Ontario, R. S. O. ch. 194, for delivering liquor to one John O'Grady whilst the said O'Grady was intoxicated.

The objections taken were: 1. That the conviction directed imprisonment without distress; 2. That there was no evidence to support the conviction, either of the delivery, or of the fact that the defendant was a person licensed under the Act.

In Michaelmas Sittings, November 19, 1890, of the Divisional Court, (composed of ROSE and MACMAHON, JJ.) *Aylesworth*, Q. C., supported the motion. The conviction is clearly bad as distress should have been directed before imprisonment was awarded. There is no evidence of the commission of the offence or proof that the defendant was a licensed hotel keeper. Section 106 provides a means of proving the fact, and this is the proper mode to be adopted.

Langton, Q. C., contra. The Court can amend the conviction under section 87 of the "Summary Convictions Act," R. S. C. ch. 178, as amended by sec. 27 of 53 Vict. ch. 37

(D.) The conviction is, however, good without any amend- Argument.
ment, for the magistrate may simply award the penalty, and the secs. 62-67 of that Act direct the means for afterwards enforcing it when that course becomes necessary. The evidence is sufficient to shew that the defendant was a licensed hotel keeper ; although a mode of proving the case is given by section 106 this does not prevent it being otherwise proved. The statement made by Patrick O'Grady without objection in fact amounted to an admission that the defendant was so licensed.

Aylesworth, Q. C., in reply. The authority to make amendments is merely of clerical errors, and cannot be urged as going the length of authorizing the Court to draw up what amounts to a new conviction.

February 2nd, 1891. ROSE, J. :—

It seems to me that the amendment of sec. 87 of the " Summary Convictions Act" by 53 Vict. c. 37, sec. 27, (D.) applies to this case. True the conviction was made and *certiorari* granted before the coming into force of the amending Act ; the amendment however, relates merely to procedure. It does not, I think, take away any vested right, but enables the Court to sustain a conviction when satisfied that an offence of the nature described in the conviction has been committed.

Under the amendment the Court, being so satisfied, has been given power to make such other conviction or order in the matter as the Court may think just, and may by such order exercise any power of which the justice whose decision is appealed from might have exercised, and such order of conviction is declared to have the same effect and may be enforced in the same manner as if it had been made by such justice, and this notwithstanding that the punishment imposed or the order made is in excess of that which might lawfully have been imposed or made.

The opening words of sec. 87 are " No conviction or

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Rose, J.

order made by any justice of the peace and no warrant for enforcing the same, shall, on being removed by *certiorari* be held invalid," etc. When the defendant applied to the Court for an order *nisi*, sec. 87 had been amended, and, therefore, the words literally applied, and I think the intention was that the amendment should apply to all convictions, and that the intention was not to restrict the effect of such amendment to convictions made after the Act, but the remedial legislation was for the purpose of sustaining all convictions in respect to which motions to quash should be made after the passing of the Act. See *Regina v. Lynch* 12 O. R. 372.

If, therefore, we are satisfied that an offence of the nature described in the conviction has been committed, we must not give effect to the first objection. I have accordingly examined the evidence and find that the defendant having refused to sell to John O'Grady, and having furnished a bottle of liquor to his companion, thereupon Patrick O'Grady, brother of John O'Grady, finding his brother in possession of the bottle of liquor, took it away from him and took it back to the defendant and laid it on the bar and remonstrated with the defendant for giving liquor to his brother while drunk. Subsequently John O'Grady applying for the liquor it was handed to him by the defendant. Now the defendant well knew that John O'Grady was under the influence of liquor; and that the liquor which he sold to his companion had been found in the possession of John O'Grady, had been taken away from him and given back to him, the defendant, because John O'Grady was under the influence of liquor and because it was desired that he should not be furnished with more liquor; and notwithstanding his knowledge of these facts, he gave back this bottle of liquor to John O'Grady. It seems to me that this was a wilful violation of the letter and spirit of the Act; that it was the delivery of intoxicating liquor to a drunken person.

The defence set up that the liquor had been sold to O'Grady's companion, and therefore that O'Grady was

entitled to it, seems to me to be no defence. I think the facts show clearly that whatever form was gone through, the liquor was in fact obtained by John O'Grady and the subsequent delivery of such liquor to John O'Grady after remonstrance by his brother, was inexcusable. I am satisfied an offence of the nature described in the conviction has been committed.

Judgment.

Rose, J.

The objection with which for sometime I was more pressed was that there was no evidence that the defendant was a person licensed under the "Liquor License Act." The only evidence is the statement of Patrick O'Grady in which he speaks of the defendant Thomas Flynn as a person "who keeps a licensed hotel." The defendant was present and represented by counsel. While not bound to offer any evidence or contradict any statement, his counsel did in fact exercise the right of cross-examination and did not cross-examine as to this statement. Of course if the witness had been cross-examined and had declared that his knowledge of the facts had been obtained from an inspection of the license or from some similar source, the objection taken by Mr. Aylesworth would I think be fatal. See *Re Parker*, 19 O. R. 612.

But the witness may have obtained his information from admission by the defendant, and, if so, his statement of the fact would be perfectly competent evidence. I think we are not to assume that evidence which passed unchallenged by the defendant was not competent, if, on any ground, it might be held competent. I therefore think that objection cannot prevail.

The result is that an order will issue for the amendment of the conviction by inserting a distress clause therein prior to the awarding of imprisonment; and in other respects the motion is dismissed with costs.

MACMAHON, J., concurred.

[COMMON PLEAS DIVISION.]

REGINA v. CLARKE.

Intoxicating liquors—Liquor License Act—Waiver of summons or information—Adjudication—Omission to state amount of costs in—Validity of conviction—Non-statement in conviction that imprisonment was imposed unless costs of conveying to jail sooner paid.

On the trial of a misdemeanour before magistrates, the taking of an information or issue of a summons may be waived.

On a charge for selling liquor without a license contrary to sec. 70 of R. S. O. ch. 194, the defendant appeared before the magistrates, pleaded to the charge, and the evidence was gone into and the case closed without objection, the defendant convicted, and a fine of \$50 and costs imposed. An objection taken on a motion to quash the conviction that the information was taken before only one justice of the peace, was overruled, it being, under the circumstances, held to be waived; but, *Semble*, the information was apparently taken before two justices. The adjudication did not state the amount of the costs imposed:—*Held*, following *Regina v. Flynn*, ante p. 638, this did not invalidate the conviction; but, *Quære*, whether apart from the amending Acts such would be the case.

Under R. S. O. ch. 194, secs. 60, 70, it is not a valid objection to the conviction that it did not state that the imprisonment was for the term specified unless the costs and charges of conveying to jail were sooner paid.

Statement.

This was a motion to quash a conviction under sec. 70 of R. S. O. ch. 194 "The Liquor License Act," for selling liquor without a license, the grounds of which are set out in the judgment.

In Michaelmas Sittings, November 28, 1890, of the Divisional Court, composed of GALT, C. J., and ROSE, J., *Du Vernet* supported the motion.

Curry, contra.

February 3rd, 1891. ROSE, J.:—

The first objection was that no locality was shown.

The evidence shewed that the offence was committed "in this city."

We held on the argument that there was clearly nothing in this objection.

The second objection was there was no evidence of a sale by the defendant or on his premises. This objection was also overruled on the argument.

Judgment.
Roe, J.

It was then objected that the justice had no jurisdiction because the information was laid before one justice, and it did not appear that he had any jurisdiction to receive the information; it being urged that the information should have been laid before either the police magistrate or two justices acting in his absence at his request.

I think we need not consider whether there is anything in this objection or not, because, in my opinion, the defendant has waived the objection.

It appears from the material before us that the conviction was made by two justices who had jurisdiction to hear a complaint under such section. The conviction states that they were acting in the absence of the police magistrate and at his request. The defendant appearing before such justices pleaded not guilty. The evidence was taken in his presence, and, at his request, the case was adjourned until the next day when he failed to appear. Thereupon the justices adjudicated upon the question of his guilt, found him guilty and fined him \$50 and costs, and in default of payment forthwith, imprisonment for three months in gaol at hard labour.

From the material before us it seems to me that it is reasonably clear that the information was laid in the presence of both the magistrates, although, upon the face of it, it appears to have been laid before one of them.

I have no doubt from the facts set out upon the affidavits which were filed upon this motion that it was made in the presence of both. But I do not rest my decision upon that ground. I think that a defendant clearly can waive both information and summons. I refer to *Shepherd v. Postmaster General*, 10 Cox C. C. 15; *Regina v. Shaw*, 10 Cox C. C. 66; *Blake v. Beech*, 1 Ex. D. 320; *Whelan v. The Queen*, 28 U. C. R. 1.

In the first case the objection was that there was no information. The defendant was arrested on a charge of

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Rose, J. injury to property preferred. The case proceeded without
objection and the Court sustained the conviction.

In *Regina v. Shaw*, Erle, C. J., said, at p. 71 "But in my opinion and in my experience where a party appears before a justice charged with an offence within his jurisdiction the justice has jurisdiction to dispose of the case without a summons or without any information in writing being laid before him unless the statute creating the offence imposes the obligation of not hearing a case without these preliminaries. The whole proceedings may be drawn up at the time of the hearing."

In *Blake v. Beech*, where the conviction was not upheld, the judgment proceeded upon the ground that there had been no waiver.

Cleasby, B., at p. 333, said: "And it is well settled by decided cases that where the information is for one offence, and where if the defendant appears the charge against him is for another offence, the proceedings are irregular and the conviction cannot be upheld," citing *Martin v. Pridgeon*, 1 E. & E. 778, and *Regina v. Brickhall*, 33 L. J. M. C. 156. He adds "Such an irregularity may be waived, as appears by several cases, particularly *Turner v. Postmaster General*, 5 B. & S. 756."

Sec. 94 of R. S. O. (1887,) ch. 194, certainly requires that informations or complaints under the Act shall be laid or made in writing. There was in fact an information in writing and I think that we may assume that that information was read over to the defendant when he pleaded not guilty, and such reading over and plea were in the presence of the two magistrates who heard and convicted.

I think this objection must be overruled. I base my opinion upon the simple ground that even if there had been no information and no summons, and I believe there was no summons, the defendant certainly, upon a charge of a misdemeanour, by appearing, pleading to the charge and allowing the evidence to be given and the case to be closed without objection, waives his right to object to the absence of either information or summons.

Judgment.

Rose, J.

It was further objected that the adjudication should have stated the amount of the costs. Having reference to our judgments delivered this day in *Regina v. Flynn*, ante p. 638 and *Regina v. Johnson*, not reported, I think this objection is not valid. I do not say whether it would or would not be valid apart from the amending Act. I think we are bound to dispose of the case upon the evidence and make such order as a justice might have made notwithstanding any formality that may appear in either the adjudication or order, for I am satisfied that an offence of the nature described in the conviction was committed.

The last objection to be noted was that the conviction should have adjudged imprisonment for the term specified unless the costs and charges only of conveying to jail were sooner paid.

I hardly understand this objection. Sec. 70 provides for a penalty of not less than \$50, besides costs, and not more than \$100 besides costs. Sec. 58 of R. S. C. ch. 178 provides that in every case of a summary conviction or of an order made by a justice, such justice may in his discretion award and order under and by the conviction or order that the defendant shall pay to the prosecutor or complainant such costs as to said justice seems reasonable in that behalf etc.

And by sec. 60 it is provided that the sum so allowed for costs shall in all cases be specified in a conviction or order, or order of dismissal, and the same shall be recoverable in the same manner and under the same warrants as any penalty adjudged to be paid by the conviction or order is to be paid.

The conviction falls within these provisions.

By sec. 7 of 53 Vict. ch. 56, (O.) power is given to justices by the conviction to adjudge payment of costs and charges of the commitment and conveying to prison; but that in no wise limits the power of the justice under the sections to which I have referred.

The motion fails and must be dismissed with costs.

GALT, C. J., concurred.

[COMMON PLEAS DIVISION.]

REGINA v. SCOTT.

Intoxicating liquors—"Liquor License Act"—Conviction form of—Summary Convictions Act—Enforcement of penalty—Witnesses, necessity of evidence being read over and signed—Sec. 96, sub-sec. 2, construction of.

The defendant holding a shop licence was convicted for allowing liquor to be drunk on the premises contrary to section 60 of the "Liquor Licence Act."

Quære, whether a conviction in such case need do more than impose the penalty and costs and the provisions of the "Summary Convictions Act" be called in aid for its enforcement, namely, by the issue of a warrant of distress under sec. 62 in case of non-payment of the fine due, and in default thereof a warrant under sec. 67 for committal; or whether the forms provided for by sec. 53 must be followed providing for distress and in default imprisonment, unless, etc.; but the question was immaterial, as the Court, as a matter of precaution, amended the conviction so as to include these provisions.

An objection that it did not appear that the evidence had been read over to the witnesses was overruled following *Regina v. Excell*, ante p. 633. The direction in sub-sec. 2 of sec. 96, as to the witnesses signing their evidence is not imperative but directory merely.

Statement

In Hilary Sittings, 1891, *DuVernet* moved before the Divisional Court, composed of GALT, C. J., and ROSE, J., for an order *nisi* to quash a conviction under sec. 60 of the "Liquor License Act," R. S. O. ch. 194.

The conviction was, because the defendant, who held a shop license in the city of Hamilton, allowed liquor to be drunk on the premises.

On the return to the *certiorari* the magistrates put in the conviction originally drawn up and two convictions subsequently drawn up to meet possible objections to the original conviction.

The conviction originally drawn up, imposed a fine of \$50, and in default of payment, imprisonment; not having any distress clause; the form of conviction under section 70 of the Act having been apparently followed.

The second conviction adjudged payment of the fine and costs; in default, distress; and in default of sufficient distress, imprisonment for three months, without any option of being released on payment of the fine, etc., being expressed in the conviction.

The third conviction did not award payment of costs, ^{Statement.} and was in other respects in the same form as the second conviction.

It was urged that the first conviction was bad, because under section 60 a penalty in money, namely, not less than \$50, was imposed (*i.e.*, the penalty named in section 70), and no mode of raising or levying the penalty was provided, so that the "Summary Convictions Act," R. S. C. ch. 178, sec. 62, applied, under which a distress warrant should first issue; that the second conviction was bad, because it awarded costs, while section 60 authorized the imposition of the penalty in money mentioned in section 70, *i.e.*, not less than \$50, and that only. It was also urged that all the convictions were bad, because there was no evidence to support any of them; and also because the evidence had not been read over to the witnesses and signed by them.

February 5th, 1891. ROSE, J.:—

Section 60 provides that for an offence thereunder the offender shall be liable to "the penalty in money imposed by section 70 of this Act."

Sec. 70 provides for a penalty of not less than \$50 besides costs, and not more than \$100 besides costs.

Examining the evidence in this case I am of the opinion that it shows that liquor was drunk on the premises of the defendant for which premises the defendant held a shop license in the city of Hamilton within the jurisdiction of the police magistrate, by John Jaynes and his brother who bought the liquor.

The expression "he served us personally," is some evidence of the fact of permitting liquor to be drunk on the premises; and the only fair inference from the evidence as a whole is that an offence against sec. 60 was committed.

The objection that the evidence does not appear to have been read over to the witnesses was disposed of in *Regina v. Excell*, *ante* p. 633.

The direction in the Act as to the witnesses signing

Judgment.

Rose, J.

their evidence, sub-sec. 2 of sec. 96, is not, in my opinion, imperative but is directory only. See cases collected in Maxwell on Statutes, 2nd ed., pp. 450 to 470.

Mr. DuVernet urged that the distress clause was improperly inserted for various reasons.

I am inclined to accede to his argument that sec. 60 by reference to sec. 70 incorporates only the provisions of sec. 70 as to the penalty and not the provision for punishment in default of payment. Comparing the concluding words with those of sec. 59 gives much weight to this argument; but, if so, the combined effect of sections 60 and 70 of the "Liquor License Act," and secs. 58, 60, 62 and 67 of the "Summary Convictions Act," R. S. C. ch. 178, is to enable the enforcement of payment to be by distress, etc., as in the second conviction. It will be noted that sec. 88 of the "Liquor License Act" was repealed by 53 Vict. c. 56 sec. 10 (O.) The third conviction omits the order as to costs.

As I have said my impression is that the second conviction was in proper form as there is power given by sections 58 and 60 of the "Summary Convictions Act" to award costs and collect them in the same manner as the fine or penalty is ordered to be collected; but I have not very carefully considered the question as the defendant cannot complain of not being ordered to pay costs. See sec. 87 of the "Summary Convictions Act."

The motion must be refused.

GALT, C. J., concurred.

Upon the Court delivering the above opinion Mr. Du Vernet applied to be heard upon the question whether the second conviction, or any of the convictions, was in proper form—namely, the omission of the distress clause in the first conviction; and in the second and third making the time of imprisonment absolute, thus preventing the prisoner from being released on payment of the fine. Leave was granted, with instructions to notify the counsel for the magistrates to appear and argue the point.

In the same sittings, February 6, 1891, of the Divisional Court, (composed of GALT, C. J., and ROSE, J.) the argument took place, *Du Vernet*, for the applicant.

Judgment.

Rose, J.

Langton, Q. C., contra.

March 6, 1891. ROSE, J.:—

The second conviction orders distress, and in default of sufficient distress, imprisonment, without saying, that the defendant should remain in imprisonment during the three months named in the conviction *unless the fine and costs were sooner paid*.

I have considered this question which is not free from difficulty, although I do not know that much practical benefit arises from its determination. As I have already indicated sec. 60 of the "Liquor License Act" does not provide any mode of collecting the fine, nor does it provide for the infliction of costs.

Sec. 58 of the "Summary Convictions Act" gives the power to award costs in such a case as the one in question; and sec. 60, of the same Act, provides that "the same shall be recoverable in the same manner and under the same warrants as any penalty, adjudged to be paid by a conviction or order, is to be recovered."

By sec. 62 power to levy the penalty by distress is given; and by sec. 67 it is enacted as follows: "and whenever the Act or law on which the conviction or order is founded provides no remedy, in case it shall be returned to a warrant of distress thereon, that no sufficient goods of the defendant can be found, the justice to whom such return is made, or any other justice in and for the same territorial division, may, if he thinks fit, by his warrant as aforesaid, commit the defendant to the common gaol or other prison of the territorial division for which such justice is acting, for any term not exceeding three months."

It is apparent from these sections, taken alone, that the convicting magistrate has only to determine in the first instance whether the defendant is guilty, adjudicate upon

Judgment. the penalty to be imposed and as to costs, when, by sec. 62
Rose, J. the collection of such penalty by distress may be enforced; and, if such distress be not sufficient, then, under sec. 67, any justice may by his warrant commit the defendant, as I have above set out.

If there were no other section referring to the matter I should be clearly of the opinion that the conviction need not refer to either the distress or the imprisonment in default, and that the conviction might be by one order, the distress by a separate and distinct warrant issued by the convicting or other justice, and the imprisonment by a further warrant issued by either the convicting or other justice: Paley on Convictions, 6th ed., p. 269; *Rex v. Helps*, 3 M. & S. 331.

If such were the proper view to take, the provisions in the order of conviction as to distress and imprisonment might be rejected as surplusage.

Section 53 of the "Summary Convictions Act," however, provides that the conviction or order shall be drawn up "in such one of the forms of conviction (J. 1, 2, 3,) or of orders (K. 1, 2, 3,) in the schedule to this Act, as is applicable to the case or to the like effect."

The forms of conviction referred to set out in terms the provisions for distress and for imprisonment in default of distress; and provide that the imprisonment shall be for the term named, unless etc.

Whether a conviction can be complained of that does not follow such form in reference to the distress and imprisonment it is perhaps not necessary to determine. It certainly will be found convenient to follow such form as a matter of direction to the justice drawing up the warrant of commitment: *Regina v. Smith*, 46 U. C. R. 442; *Regina v. Shaw*, 23 U. C. R. 616. A conviction that follows the statutory form cannot be complained of. The warrant of commitment under sec. 67 is to be "as aforesaid." This I think must refer back to sec. 66 where the form of warrant of commitment is given. Such form, as far as applicable to such a case as the one before us, must, I think, be used and

by its provisions the imprisonment is directed for the term imposed, unless etc. Section 98 of the Act requires the keeper of a prison to receive payment of the penalty and costs and charges mentioned in the warrant of commitment, and it may be that, even if the conviction or commitment were not in the form provided by the statute, the provisions of that section would be imperative and compel the keeper to receive payment and liberate the prisoner although the warrant of commitment did not contain any provision authorizing him so to do.

Judgment.

Rose, J.

The point was argued chiefly for the purpose of obtaining some expression of opinion to guide in the preparation of orders of conviction. It does not become material in the present case, as far as I am aware, for, as far as we are informed, no warrant of commitment has been issued, and no difficulty in fact has arisen. As a matter of precaution I think the conviction may be amended to meet the form provided by the statute, although I have not arrived at a clear opinion that such amendment is absolutely necessary.

As the application fails on the merits, I think we should not vary the order we made on the previous day but that the motion should stand refused.

GALT, C. J., concurred.

[QUEEN'S BENCH DIVISION.]

MOORE V. JACKSON ET AL.

Husband and wife—Separate estate of woman married in 1869—Lands acquired before and after 1st July, 1884—R. S. O. ch. 132, sec. 7—R. S. O. ch. 134, sec. 3.—Tenancy by the curtesy—Sale of separate estate, subject to.

The effect of R. S. O. 1877 ch. 125, sec. 3 (now R. S. O. ch. 132, sec. 4, sub-sec. 5) is to deprive the husband of any estate, by the curtesy or otherwise, *during the life of the wife*, in lands to which the section applies, being those acquired before or after marriage by a woman married between 5th May, 1859, and 2nd March, 1872.

By sec. 5 of 47 Vict. ch. 19 (now R. S. O. ch. 132, sec. 7) the *jus disponendi* was given to the married woman, and by it lands acquired by her after the 1st July, 1884, became her separate estate.

The amendment made by sec. 22 of 47 Vict. ch. 19 (now embodied in R. S. O. ch. 134, sec. 3) enabled the married woman to dispose of her real estate without regard to the date of her marriage or of the acquisition of the property; but under it she can convey her own estate only and not any estate to which her husband may be entitled by the curtesy after her death; while under sec. 7 of ch. 132 she can convey free from his estate by the curtesy.

Where a woman married in 1869 acquired, by conveyances from strangers, lands in Etobicoke in 1879 and 1882 and lands in Parkdale in March, 1887, and was in the lifetime of her husband sued upon promissory notes made after March, 1887:—

Held, that all the lands were her separate estate liable for her debts; but the Etobicoke lands were subject to the possible right of her husband to hold them after her death, she dying seized intestate, for his life, in case he survived her, as tenant by the curtesy, and that subject to this possible estate of her husband they were liable to be seized and sold for the satisfaction of the plaintiff's claim.

Statement.

THIS was an action brought by Edward Moore against Jane Jackson and Mary Jane Graydon to recover the balance due upon certain promissory notes made by the defendant Jane Jackson, a married woman, to the plaintiff, as collateral security for certain advances made by the plaintiff to one Stonehouse and one Essery, and to set aside a conveyance by the defendant Jane Jackson to the defendant Mary Jane Graydon, her daughter, of certain lands in the township of Etobicoke as fraudulent and void against the plaintiff.

An action between the same parties upon the same contract and seeking the same relief was tried before BOYD, C., at Toronto on 20th November, 1888. The facts appear from the report of the appeal from his judgment, reported

in 16 A. R. 431, excepting those set forth below. That Statement.
action was dismissed without prejudice to the plaintiff's right to bring a new one for the same cause of action, and the present action was accordingly begun on 10th September, 1889.

The additional facts proved upon the trial of the present action were that the defendant Jackson was married to her present husband in January, 1869; that on 2nd June, 1879, she acquired lots 19 in cons. C. and D. in the township of Etobicoke, by ordinary conveyance to her in fee, and that in February, 1882, she acquired in the same way and for the same estate lots 15 in cons. C. and D., and parts of lots 16 in the same concessions of Etobicoke, and that on 30th March, 1887, she acquired in the same way and for the same estate certain lands in the town of Parkdale, all of which lands in Etobicoke remained vested in her at the time she signed the letter to the plaintiff on 23rd July, 1886, set out at p. 432 of the report of the case in 16 A. R., and also, as well as the Parkdale lands, at the time she signed the notes upon which this action was brought, all of which were dated in the months of May, June, and July, 1887.

It was also sworn and not denied that the lands covered by the mortgage from Stonehouse and Essery to the plaintiff had been sold with the knowledge, consent, and concurrence of Mrs. Jackson.

The action was tried before ARMOUR, C. J., at the Toronto assizes on 24th September, 1890, without a jury, and judgment was given by him on 10th November, 1890, as follows:—

“It is not without a good deal of doubt that I have come to the conclusion that the Etobicoke lands were not the separate property of the defendant Jane Jackson, in respect of which she was capable of rendering herself liable for the promissory notes sued for, but I think that this result is the inevitable logic of the decisions of the Court of Appeal in *Furness v. Mitchell*, 3 A. R. 510, and *Douglas v. Hutchison*, 12 A. R. 110.

Statement.

"The claim for relief set forth in the pleadings as against these lands, will, therefore, be dismissed with the costs occasioned to the defendants by reason thereof.

"The Parkdale lands were, however, such separate estate, and judgment will, therefore, be with costs against the defendant Jane Jackson for the amount to be found due to the plaintiff, to be levied out of any separate estate she now has or hereafter may acquire.

"The sale of the mortgaged property was made, according to the plaintiff's evidence, at the request and with the consent of all parties interested; such a sale could not, therefore, work the discharge of the defendant Jackson, the surety.

"There will be a reference to ascertain what is due to the plaintiff in respect of the said promissory notes, having due regard to the position of the defendant Jane Jackson as surety, and to the proper application of the proceeds of the mortgaged property and of any payments made."

At the Sittings of the Divisional Court at Michaelmas, 1890, the plaintiff moved to vary this judgment by declaring that he was entitled to have his debt realized out of the lands in Etobicoke as well as those in Parkdale. At the same sittings the defendant Mrs. Jackson also moved to set aside the judgment and enter it for the defendants, upon the ground that by his dealings with the property mortgaged by Stonehouse and Essery the plaintiff had discharged her from liability, and upon the further ground that she had never contracted or assumed to contract with regard to her separate estate.

Both motions were argued together before the Divisional Court (FALCONBRIDGE and STREET, JJ.) on 3rd December, 1890.

J. R. Roaf, for the plaintiff. The plaintiff wishes to have the conveyance by the defendant Jane Jackson to the defendant Graydon declared void. I submit that the plaintiff can realize on the land in Etobicoke, though it was

not separate estate, because the conveyance of it was **Argument.** fraudulent, and in case the defendant becomes a widow it will be exigible under our execution. It is not shewn that the husband has any estate by the curtesy which would interfere; there is no evidence that there are any children. See *Furness v. Mitchell*, 3 A. R. 510. When she passes free from coverture, the debt would have to be paid out of her estate, which, when she became a widow, would no longer be separate estate: *Douglas v. Hutchison*, 12 A. R. 110. Even while the husband is alive, her property may be reached by equitable execution. On Jane Jackson's own admission the deed of the Etobicoke property to her daughter cannot stand, and I shew that some benefit may accrue to the plaintiff by setting it aside.

E. D. Armour, Q. C., for the defendants. The plaintiff does not move against the judgment of the trial Judge, that the Etobicoke land is not separate estate. What he asks is that the Court shall hold the land till it be separate estate, which it never can be. This is contrary to the judgment of the Court of Appeal in the previous action, 16 A. R. 431. It is the possession of separate estate which alone enables a married woman to make a contract. This married woman's liability was confined to the Etobicoke property, because the contract was made with reference to it. The allegation in the pleadings was that she had promised to pay on the faith of the Etobicoke property, the plaintiff knowing of nothing else. The contract of suretyship is embodied in the letter of the 23rd of July, 1886. But was the Etobicoke property separate estate to enable her to make that contract? The plaintiff cannot be a creditor in respect of this land, because it is not separate estate, and so the declaration asked by the plaintiff cannot be made. Then as to the Parkdale land. (a) The married woman has confined her contract to the Etobicoke land, and so comes within the exception in the Married Woman's Act of 1884. (b) She had no separate estate when she made the contract in 1886, and therefore could not contract in respect of it. She did not

Argument.

acquire the Parkdale land till 1887. She can go behind the notes to the contract of suretyship; otherwise there is no consideration for the notes, as she never got any money for them. (c) She could not bind after acquired property, because her contract was not entered into with respect to and to bind her separate property, for she had none: R. S. O. ch. 132, sec. 3, sub-sec. 3. By the old law an intention to bind separate estate had to be shewn: *Merrick v. Sherwood*, 22 C. P. 467. There is no implication as to other property where there is an express contract with reference to a particular property. (d) The creditor having applied the proceeds of the sale of the securities first to unsecured debts of the principal debtor, the surety, Mrs. Jackson, has been deprived of the benefit of the securities and so is not discharged only *pro tanto*, but altogether: *Pearl v. Deacon*, 24 Beav. 186; 1 De G. & J. 461.

Roaf, in reply. The construction of R. S. O. ch. 132, sec. 3, sub-sec. 3, contended for, would bring us back to the law as it was when *Merrick v. Sherwood* was decided. The letter of suretyship relates to two only of the notes. The evidence shews she did benefit by the advances.

February 2, 1891. The judgment of the Court was delivered by

STREET, J. :—

The defendant Jane Jackson was married in January, 1869; her husband is still living. She acquired property in Etobicoke in June, 1879, and February, 1882.

She also acquired property in Parkdale on 30th March, 1887.

The notes sued on were made in May, June, and July, 1887.

It is contended on behalf of the plaintiff that all these lands are subject to be sold for the purpose of satisfying his claim, and that the conveyance to the defendant Gray-

don should be set aside as fraudulent. On the part of the defendants it is contended that none of them are so subject, and the Chief Justice of this Court has, with much doubt, decided that the Etobicoke lands are not, and that the Parkdale lands are, subject to be sold to satisfy the claim.

Judgment.

Street, J.

The position and powers of Mrs. Jackson with regard to the several properties in question here must be ascertained before a proper decision can be arrived at, and to ascertain them in the face of the conflicting enactments and of the divergence of opinions on the subject is a task not entirely free from difficulty.

It appears necessary to go back to the original Married Woman's Act of 1859, ch. 73, Con. Stat. Upper Canada, the second section of which gave to every woman married before 4th May, 1859, or after that date, without any marriage settlement, the right, notwithstanding her coverture, to have, hold, and enjoy her real estate free from the debts and obligations of her husband, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried.

Whilst this was the only statute in force upon the subject the case of *Royal Canadian Bank v. Mitchell*, 14 Gr. 412, came up for decision. In that case a married woman, having an ordinary life estate in lands, had signed a promissory note, and it was sought to make her interest liable to be seized for payment of the note, upon the ground that the effect of the Act of 1859 was to make it her separate estate. In an elaborate judgment the late Chief Justice, then Vice-Chancellor, Spragge, held that the Act of 1859 did not convert into separate estate the ordinary estate of a married woman in lands which were not otherwise held by her to her separate use. The true principle of that decision is, I think, to be found condensed at p. 120: "Now, when we look at the principle upon which it is held in England that the separate estate of a married woman is liable upon her contracts, it is clear that the real property of a married woman is not made liable by the Act. The Act confers upon such property certain quali-

Judgment.
Street, J.

ties incident to separate estate, but it withholds that quality which is the very foundation of the English decisions, the *jus disponendi*. The principle of the decisions is that a married woman entering into a contract, having separate estate, and having as incident to it a right to dispose of it, and being not personally liable upon her contract, is presumed to contract with reference to her separate estate, and to intend to charge it. But such presumption cannot arise where she cannot charge her real estate; where, even if she had done so in express terms, it would have been unavailing. It would infringe the maxim that a person cannot do indirectly that which he cannot do directly."

The Act of 1859 contained a provision, sec. 4, that "No conveyance or other act of a wife in respect of her real estate shall deprive her husband of any estate he may become entitled to as tenant by the curtesy;" and a further provision in sec. 13, that, "Any estate or interest to which a husband may, by virtue of his marriage, be entitled in the real property of his wife, whether acquired before or after 4th May, 1859, or after this Act takes effect, shall not during her life be subject to the debts of the husband."

With reference to this latter clause the judgment proceeds to remark: "But there is another provision in the Act which shews that it is only *sub modo*, if at all, that it makes the real property of the wife separate estate, for it recognizes an estate and interest in the husband, during coverture, and provides that it shall not, during her life, be subject to his debts. It is of the essence of separate estate that the husband has no estate or interest in it."

These last words must be taken in connection with the context as meaning "that it is the essence of separate estate that the husband has no estate or interest in it *during the life of the wife*," because it was law at that time, although perhaps not so clearly settled as it has been since, (*Cooper v. Macdonald*, 7 Ch. D. 288) that a husband is entitled after the death of his wife to curtesy in her separate estate which she has not disposed of by deed or will.

Then came the Act of 1872, the first section of which

provided that after its passing (2nd March, 1872,) "the real estate of any married woman, which is owned by her at the time of her marriage, or acquired in any manner during her coverture * * shall * * be held and enjoyed by her for her separate use, free from any estate or claim of her husband during her lifetime, or as tenant by the curtesy, etc."

Judgment.

Street, J.

It was under this section as it originally stood that *Furness v. Mitchell*, 3 A. R. 510, was decided. Erasmus and Mary Wilson were married before 4th May, 1859, and she acquired the land in question by conveyance to her in fee in September, 1874. She died intestate on 8th January, 1876, and the question was whether his estate by the curtesy had been taken away by the section above quoted from the Act of 1872. The Court held that the Act applied although the marriage had taken place before it was passed; that no interference with any vested right of the husband would be effected by holding the Act applicable, because the wife had acquired the land after the passing of the Act; and that full effect could be given to the Act by treating it as depriving him during the life of his wife of any estate in possession in his wife's lands, leaving him his estate by the curtesy after her death in case she died intestate.

From the time of the passing of the Act of 1872 down to the revision of the statutes in 1877, the law remained settled that the Act of 1872 applied to all cases in which the land in question had been acquired after the passing of the first mentioned Act, whatever may have been the date of the marriage. In the revision of 1877 a change in this respect was made, and the date of the marriage is made the test in each case. Three classes of married women are there provided for:—

1st. Those married before 4th May, 1859, whose rights were left to be governed by the original Act of 1859.

2nd. Those married between 5th May, 1859, and 2nd March, 1872.

Judgment.

3rd. Those married after 2nd March, 1872.

Street, J.

It is in the second of these classes that the defendant here comes, as she married in 1869, and the provision with regard to this class is sec. 3 of ch. 125, R. S. O. 1877: "Every woman who married between the 5th May, 1859, and the 2nd March, 1872, * * shall and may, notwithstanding her coverture, have, hold, and enjoy all her real property, whether belonging to her before marriage or acquired by her by inheritance, devise, or gift, or as heir-at-law to an intestate, or in any other way after marriage, free from the debts and obligations of her husband, and free from his control or disposition, without her consent, in as full and ample a manner as if she continued sole and unmarried."

This section is now revised in the same form in subsec. 2 of sec. 4, ch. 132, R. S. O. 1887.

The clauses 4 and 13 of the Act of 1859, which were thought to recognize some right of the husband to an interest during her life in his wife's lands, do not apply to this section, and there is no reason why the section should not have its full meaning. A wife cannot "have, hold, and enjoy" her property if her husband has rights in it during her life, and so I think it must be held that he has none during her life in lands to which the section applies, and that he is deprived not only of the marital right to hold an estate during the joint lives of himself and his wife, in the freehold lands of his wife, but also during her life of the tenancy by the curtesy into which his marital right is enlarged upon the birth of issue.

The position in 1877 and from thence down to 1884 of women married before 2nd March, 1872, and after 4th May, 1859, was that they had the right to enjoy their lands free from any estate of their husbands; but that the husbands surviving them and being otherwise entitled to an estate by the curtesy might enjoy that estate after the death of the wife. But, inasmuch as no right of disposing of their lands had been given them unless by conveyance in which their husbands joined, the absence of this right

prevented, and was the only thing which prevented, their estate being separate estate. Judgment.
Street, J.

The Married Woman's Act of 1884, ch. 19, 47 Vict. (O.) came into force on 1st July, 1884, and by the 5th sec. provided that: "Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, etc." This section now appears as sec. 7 of ch. 132, R. S. O. It only affects the property in Parkdale, that being the only property acquired by Mrs. Jackson after 1st July, 1884. The effect of it, so far as that property is concerned, appears to be to make it separate estate, and as such liable to be sold to satisfy the debt due the plaintiff, which she incurred after she acquired this Parkdale property. The Act declares it to be separate estate without any saving of her husband's rights; it was not acquired until after the Act was passed, so that his interests were not vested at the time; and as separate estate limited to her own use, she could sell it free from her husband's curtesy; so that I think a purchaser would take it from the sheriff similarly free from that estate.

By sec. 22 of the same Act an amendment was made in the 3rd sec. of ch. 127, R. S. O. 1877, relating to the transfer of the real estate of married women, which as amended read and still reads as follows: "Every married woman being of the full age of twenty-one years, may, by deed, convey her real estate and * * any interest therein * * and may also, by deed, appoint an attorney or attorneys for purposes aforesaid * * as fully and effectually as she could do if she were a feme sole." The amendment made by sec. 22 of the Act of 1884, above referred to, consisted in striking out the portion of the original clause which up to that time had required the husband to be a party to the deed by which his wife transferred her land. The section as amended is now sec. 3 of ch. 134, R. S. O. 1887.

Judgment.

Street, J.

We have, therefore, now, sec. 7 of ch. 132, R. S. O., authorizing women married before 1st July, 1884, not only to hold and enjoy but also to dispose of, as separate estate, property acquired after that date, and sec. 3 of ch. 134, R. S. O., authorizing married women generally to dispose of their real estate without regard to the date of their marriage or when the property was acquired. The distinction between the two provisions seems to be this: that a married woman conveying under sec. 3 of ch. 134, conveys her own estate only, and not any estate to which her husband may be entitled as tenant by the curtesy after her death; and that under sec. 7 of ch. 132, conveying property declared to be her separate estate, she conveys free from the tenancy by the curtesy of her husband. The reason why, although married before 1st July, 1884, she can convey free from her husband's estate by the curtesy when she comes within sec. 7 of ch. 132, is because lands acquired by her after 1st July, 1884, are declared to be her separate estate, and being separate estate, may be devised or conveyed free from his curtesy. See *Cooper v. Macdonald*, 7 Ch. D. 288, and *Furness v. Mitchell*, 3 A. R. 510, per Moss, C. J., at p. 514.

If this is the correct view, then it is in the power of all women married after 1st July, 1884, by deed or will without the concurrence of their husbands, to convey or dispose of their property, whenever acquired, free from any estate by the curtesy, and also for women married before that date to deprive their husbands of curtesy in the same way in lands acquired after that date. An Act was passed in 1888, ch. 21, 51 Vict. (O.), providing a means by which a wife whose husband is entitled to tenancy by the curtesy in her lands, and in any case in which she is unable to give a valid deed of her lands without her husband joining therein, may obtain an order from a Judge dispensing with the necessity for his being made a party to the conveyance in certain cases. The operation of this statute seems to be confined to cases in which a woman married before 1st July, 1884, desires to convey lands which have been acquired by her before that date.

The position of Mrs. Jackson appears, therefore, so far as the lands in Etobicoke are concerned, to have been at the time she conveyed them to her daughter Mrs. Graydon that she could not convey them free from her husband's right to enjoy them after her death as tenant by the curtesy without his concurrence, but that subject to this right of her husband's, accruing only in case he survived her, she dying seized intestate, she had the same absolute right that she would have had, had she been unmarried, to hold, enjoy, lease, convey, or devise the freehold and inheritance without his consent and without interruption on his part—the right to hold free from the husband's debts and control having arisen under the Act of 1872, and the right to convey under sec. 22 of the Act of 1884.

Judgment.

Street, J.

It is said, however, that notwithstanding all this, it was not separate estate, because she could not convey it free from her husband's curtesy, and therefore her creditors could not touch it. To that I think the answer is that, although the whole freehold and inheritance was not separate estate because of the possible life estate in the husband carved out of it between the wife's freehold and inheritance, still the estate in possession and the reversion in fee after the husband's estate, both of which were vested in the wife with an untrammelled right to dispose of them, were separate estate, just as if they had been limited by a settlement to her separate use with an estate in her husband interposed in case he should survive her.

I have looked in vain for any authority declaring that the interposition of such an estate would exempt the immediate estate in the wife for life, to her separate use, and her reversion in fee, also limited to her separate use, from liability to creditors. I can find no principle upon which such an authority could have been based, and I think that the proposition is contrary to the principles upon which married women with separate estate have been held liable to pay their debts: *Johnson v. Gallagher*, 3 D. F. & J.

Judgment. 494; *Picard v. Hine*, L. R. 5 Ch. 274; *Field v. McArthur*,
Street, J. 27 C. P. 15; *Lawson v. Laidlaw*, 3 A. R. 77.

I see nothing in *Douglas v. Hutchison*, 12 A. R. 110, inconsistent with holding Mrs. Jackson's Etobicoke property to this extent liable to pay this debt. The Court in that case held that the dower of a woman, who married a second time in 1871, in the lands of her first husband, who had died in 1870, was not liable during her second coverture to be sold under execution against her, and was not to be treated as separate estate held by her in respect of which she could contract. The reasons given are plain: the property was acquired by her upon the death of her first husband, that is to say, before 1872; the second marriage also took place before that year, and the action was brought before the Act of 1884 was passed, which would have given to the property what was necessary to give it the quality of separate estate, by giving to the married woman an absolute right of disposing of it. As it was, at the time the action was brought she had only the right to hold it free from her husband's debts and control, but had no power to dispose of it, and the case was governed by *Royal Canadian Bank v. Mitchell*, 14 Gr. 412.

I am of opinion, therefore, that the Etobicoke land was the separate estate of Mrs. Jackson over which she had an absolute power of disposition subject only to the possible right of her husband to hold it after her death for his life, in case he survived her, as tenant by the curtesy, and that subject to this possible estate of her husband it is liable to be seized and sold for the satisfaction of the plaintiff's claim.

I think the conveyance of the land to the defendant Graydon should be set aside as fraudulent under the statute of Elizabeth, the words of which are in my opinion sufficiently wide to cover such a transaction as this. The sale by the plaintiff of the property mortgaged by Stonehouse and Essery took place, according to the evidence, with the consent of Mrs. Jackson and after consultation with

her, and she cannot now claim, whatever she might have done had the sale not been with her concurrence, that being a surety she is discharged by reason of the sale having taken place. She is entitled, however, to the inquiry directed by the Chief Justice as to the application of the proceeds of the sale, having regard to her position as surety.

Judgment.
Street, J.

The result will be that the defendant's motion will be dismissed with costs, and the plaintiff will be entitled to the costs of his motion, and to have the judgment of the learned Chief Justice varied by giving him recourse to the Etobicoke lands as well as to those in Parkdale.

[COMMON PLEAS DIVISION.]

LEE V. HOPKINS.

Husband and wife—Marriage prior to 1884—Tort of wife—Joinder of husband as defendant.

Action against a husband and wife, alleged to have been married before 1884, for a tort committed by the wife :—

Held on demurrer, that the husband was properly joined as a party. *Amer v. Rogers*, 31 C. P. 195, and *Seroka v. Kallenburg*, 17 Q. B. D. 177, considered.

Statement.

THE plaintiff in this action sued a husband and wife for the false arrest and malicious prosecution of the plaintiff at the instance of the wife.

The husband demurred on the ground that he was improperly joined as a defendant, as he could not be held liable for his wife's tort, it not being charged that he was in any way connected with the tort complained of.

Middleton supported the demurrer. The Act applicable to this case is R. S. O. (1877), ch. 125. The case of *Amer v. Rogers*, 31 C. P. 195, which was a decision under that Act, expressly decides that the husband is not a proper party, and it is in accordance with the previous decisions, which are referred to in that case; and has been followed in the subsequent cases: *Barber v. Westover*, 5 O. R. 116. The Act of 1884, which is embodied in the R. S. O. (1887), ch. 132, expressly provides that where the marriage was prior to 1884, the liability shall remain as theretofore. The legislature must be assumed to have had knowledge of the judicial interpretation put on the Act, and therefore it amounts to a legislative affirmation of that interpretation. The principles which govern the decision are that the common law liability of the husband being founded on the unity of husband and wife and the inability of the wife to sue or be sued, on the removal of such inability and the rendering the wife a *feme sole*, for the purpose of suing and being sued the liability of the husband was taken away. In *Capel v. Powell*, 17 C. B. N. S. 743, it was held that

after a divorce was granted the husband was not a ^{Argument.} necessary party, because, by reason of the divorce, the inability of the wife to sue or be sued was removed. It is also pointed out that the question of the liability of the husband is not one of property or civil rights, but merely of procedure. The case of *Seroka v. Kattenburg*, 17 Q. B. D. 177, relied on by the defendant, in no way affects the question, as the English Act is quite dissimilar to the Ontario Act, and merely deals with the property of the wife, and does not purport to deal with the rights or liability of the husband or to relieve him; and there is also a marked distinction between it and our Act as to the wife's torts: and no attempt is made in the case to distinguish *Capel v. Powell*.

J. W. Nesbitt, Q. C., contra. The point here simply is, whether a husband married prior to the 1st of July, 1884, is responsible for his wife's torts. The 16th section of the Married Woman's Property Act, R. S. O. (1887), ch. 132, distinctly provides that that Act is not to increase or diminish the liability of a husband married before it came into effect, namely, 1st July, 1884. The 6th section of R. S. O. ch. 125, (1877,) provides that nothing herein contained shall be construed to protect the property of a married woman from seizure and sale on any execution against her husband for her torts, and in such case execution shall first be levied on her separate property. This section was not referred to in *Amer v. Rogers*, 31 C. P. 195, which apparently is founded on the enabling words in the concluding clause of section 20. Similar words in effect are now to be found in R. S. O. (1887), ch. 132, and were construed in *Seroka v. Kattenburgh*, 17 Q. B. D. 177, where it was decided that a person injured by the tort of a married woman may still sue the husband. The same line of reasoning was adopted in the argument for the husband in that case, as the judgment proceeds upon in *Amer v. Rogers*, namely, that as the wife is capable of being sued alone for her torts, the sole ground therefore of the husband's previous liability is removed; but the Divisional Court did not accede to the proposition, and dis-

Argument. tinctly held that the section did not relieve him from wrongs done by his wife after her marriage. The word "may" in section 20 of R. S. O. (1877), 125, cannot have any greater effect than the words "shall be capable of" in the present Act and the English Act. Mr. Justice Osler was in error in ascribing the foundation of the rule of the common law merely to procedure. The true common law rule is set forth in Schouler on Husband and Wife, secs. 133-135. As to private wrongs or torts the general rule of law is that the husband is liable for frauds and injuries of the wife whether committed before or during coverture, if committed under his coercion or by him alone, he and he alone is liable, otherwise both are for the time being liable. Where the fraud, act or injury is committed in his company and by his order coercion is presumed, and the husband becomes *prima facie* the only wrong-doer, and where committed without his order and in his absence, the wife is in reality the offending party, while the husband has become responsible for her acts by reason of her coverture. See also Kent's Commentaries, vol. 2, p. 50; MacQueen on Husband and Wife, 2nd ed., 132; also *Vine v. Saunders*, 4 Bing. N. C. 96; *Keyworth v. Hill*, 3 B. & A. 586.

December 30, 1890. ROSE, J. :—

The motion was made formally in Court, but for convenience of counsel it was not argued at length, it being agreed that their arguments should be handed in, which was subsequently done.

Having been informed that there was a conflict between the decision of our own Court in *Amer v. Rogers*, 31 C. P. 195, and the decision of the Divisional Court in England in *Seroka v. Kattenburg*, 17 Q.B.D. 177, I endeavoured, before considering these cases, to ascertain the law governing the case as it stood prior to our Married Woman's Act of 1859. When I came to examine my brother Osler's judgment in *Amer v. Rogers*, I found that nearly all the

results of my search were there collected. I shall therefore not find it necessary to do more than refer briefly to the authorities, as to the liability of a *feme covert* at law. They are nearly all traceable back to the collection of principles in Bacon's Abridgment, and Comyn's Digest, under the caption "Baron and Feme."

Judgment.
Rose, J.

It is interesting to note the control the husband had over both the person and property of the wife.

"The husband hath by law power and dominion over his wife, and may keep her by force within the bounds of duty, and may beat her, but not in a violent and cruel manner:" Bacon's Abr., "Baron and Feme" (B) p. 693.

By reason of such power and authority, "Blackstone states the wife's assumption to extend to all civil offences against the laws of society, and treats her responsibility in cases of murder, treason and the like as exceptions in respect of their heinousness as *mala in se*, and so also does Lord Hales:" Bacon's Abr. "Baron and Feme." (G.) p. 711.

"But an action for a tort done by the husband and wife *jointly* shall be against the husband alone, for the whole shall be intended to be the act of the husband as trover of goods and conversion to their use:" Comyn's Dig. B. and F. (Y) p. 253. " * * but the freehold and inheritance of the wife is subject to other rules and regulations, for the husband by the marriage does not become absolute proprietor of the inheritance, but, as governor of the family, is so far master of it as to receive the profits of it during his life, but hath no power to make an absolute sale of it without her consent:" Bacon's Abr. (C) (2) p. 694. "The marriage is a gift in law to the husband of all the wife's chattels real * * but if he makes no disposition of them in his lifetime they survive to the wife, and therefore he cannot devise them:" Bacon's Abr. (C) (2) p. 695. "All the personal estate * * that were the property and in the possession of the wife at the time of the marriage, are actually vested in the husband," and go to his executors, etc., and not to the wife though she survive him.

Judgment. (C) (3) p. 700. "Husband and wife are considered as one person in law, and as having but one will between them which is settled in the husband as the head and governor of the family, therefore the law gives him the same right over any real estate accruing to the wife during coverture as if she were seized of it before marriage; so of chattels real accruing to the wife; it also gives him an absolute power over any personal estate or interest accruing to the wife by gift, devise, or her labour." (D) p. 704.

Rose, J.

As to property therefore, a woman marrying lost control of both real and personal during marriage, and the personal property became the husband's absolutely. If the wife survived the husband, her control of certain property returned to her. Therefore, speaking generally, during marriage a husband had control over his wife's person and property.

Founded upon such rules as to the wife's property, is the husband's liability "to the wife's debts contracted before marriage, whether he had any portion with her or not," as he takes any property acquired during marriage. (F) p. 708.

This liability was, however, not absolute, for the debt must be recovered in the lifetime of the wife. "And if the husband die before the debt is recovered, the wife surviving, is liable."

So that upon the husband's death the wife regained control of certain of her property, and became again liable for antenuptial debts, as to contracts and debts after marriage.

"But generally a *feme covert* has no power to make a contract without her husband, and therefore such contract is absolutely void." Comyn's Dig. (Q) p. 241.

The husband is not liable for all purchases made by his wife, but is for necessities in certain cases.

As to torts after marriage.

"The husband is by law answerable * * for all her torts and trespasses during coverture, in which case the action must be joint against them both, for if she alone

were sued, it might be a means of making the husband's property liable without giving him an opportunity of defending himself : " (Bacon's Abr. (L) p. 734.

Judgment.

Rose, J.

"Seeing that all her personal property is vested in her husband, it would be idle to sue the wife alone : the action would be fruitless." Erle, C. J., in *Capel v. Powell*, 17 C. B. N. S. 743, at p. 784.

This liability also is not absolute. The death of the wife generally frees the husband from all responsibility, and the wife remains liable after the husband's death : *Vine v. Saunders*, 4 Bing. N. C. 102. See Bosanquet, J., as to measure of damages ; Addison on Torts, 6th ed. (Am.), p. 126, sec. 123 ; Schouler on Husband and Wife, secs. 134, 135, 136.

Generally speaking, the above is a summary of principles governing the liability of the husband and wife as far as they seem necessary for the understanding of the Act of 1859 : C. S. U. C. ch. 73.

I may observe that I am not told the date of the marriage in question, save that it was prior to 1884. It therefore may have been prior to 1859.

As to marriages prior to 1859, without any marriage settlement, the right of the husband to property of his wife then taken possession of, or reduced into possession, is not interfered with ; and so, on the facts as stated by these pleadings, the husband may have property of his wife taken possession of, or reduced by him into possession. As to other property, the husband's power of control or disposition is taken away, and freedom from his subsequent debts or obligations is declared.

As to marriages after 1859, the freedom from the husband's debts or obligations, and from his control or disposition, is declared to be as great as if the wife were sole and unmarried. But as to marriages either before or subsequent to 1859, it was declared, section 3 : " Nothing herein contained shall be construed to protect the property of a married woman from seizure and sale on any execution against her husband for her torts, and in such case execution shall be first levied on her separate property."

Judgment.

Rose, J.

And when we read section 15 limiting the liability of a husband on the wife's ante-nuptial contracts or debts to the extent or value of the interest taken by the husband in the wife's separate property after the 4th of May, 1859, it affords a strong argument that it was not intended to limit the liability for the wife's torts—certainly not in cases where the husband had obtained property belonging to the wife, and probably not in cases where he took an interest in any separate property after 1859. No reference being made to the case of liability for torts, when the husband took no property, such cases stand as they did, unless by necessary implication a change was then made.

Indeed the language of section 15 is peculiar. It does not say in terms what shall be the case when the husband takes no interest in his wife's separate estate, but merely limits the liability in cases where he does in fact take an interest.

By section 14 a married woman's separate property is made liable to antenuptial debts; but nothing is said as to liability for her torts.

So speaking generally, by the Act of 1859, the wife's separate estate is freed from the husband's debts or obligations, and from his control or disposition. Such estate is also made liable to seizure and sale on an execution for her separate debts, and on an execution against her husband for her torts; and the husband has a benefit, in that, while liable for her torts, his estate is freed until her separate property has been exhausted, and his liability to her antenuptial debts is limited to cases where he takes an interest in her separate property. And by section 13: Any estate or interest to which the husband by his marriage may be entitled in the real property of his wife, is declared not to be subject to his debts during her life.

By 35 Vict. ch. 16, sec. 9, (O.) (1872) it was declared that a married woman might "be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts as if she were unmarried." If "separate" applies at all to "torts"

then probably separate torts may mean torts committed by herself alone and not with her husband when by the old law he alone would be liable. By antecedent clauses the married woman's liability in respect to her contracts is dealt with, but nowhere is anything said as to her torts. Also is the husband's liability for the wife's debts dealt with, the Act of 1872 declaring in terms the non-liability of the husband for the wife's antenuptial debts, when the marriage took place after the 2nd of March, 1872. But nothing is said as to his liability for her torts. Clause 3 of C. S. U. C. ch. 73, above set out, is continued, and so we find the legislation at the time of the revision of the statutes in 1877.

Judgment.

Rose, J.

In 1884, subsequent to the marriage of the defendants, ch. 125 of R. S. O. (1877) was repealed, and with the repeal disappeared the section as to the liability of the wife's separate estate to satisfy an execution against her husband, for her torts; with a proviso, however, "that such repeal shall not affect any right or liability of any husband or wife married before the commencement of this Act to sue or be sued under the provisions of the said repealed Act for or in respect of any debt, contract, money, or other matter or thing whatsoever for or in respect of which any such right or liability, shall have accrued to or against such husband or wife before the commencement of this Act."

By section 13 of that Act, the liability of a husband for wrongs committed by his wife, either before or after marriage, is limited to the extent of property belonging to his wife acquired by him subject to certain deductions. This clause also contains a proviso, "that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or liability of his wife as aforesaid."

Thus for the first time in the history of the legislation was the liability of a husband for his wife's torts limited in terms.

Judgment.

Rose, J.

To decide the case before me, I do not see how I can uphold the demurrer, for, as I have suggested, for all that appears the marriage may have taken place prior to 1859, and the husband may have, prior to such date, obtained property of his wife, in which case I am clear he would be liable to an action for her torts. And, even if the marriage took place after 1872, it being prior to 1884, I am of the opinion that he is liable, because until 1884 there is no legislation expressly limiting his liability, and none, I think, limiting it by implication. Moreover, the legislature of 1884, recognizes his liability for his wife's torts, and does not free him therefrom, but merely limits it. If the reason for exemption of the husband from liability for the wife's torts does not exist in cases where he had property belonging to his wife, then unless one rule could exist for such cases, and another for cases where the husband takes nothing, the same liability exists in each case. As we have seen the existence of the liability did not originally depend on the husband having any portion with his wife, as by law he took any property acquired by her during marriage.

In *Amer v. Rogers*, 31 C. P. 195, sec. 3 of C. S. U. C. ch. 73, then sec. 8 of 35 Vict. ch. 16, was considered, and the learned Judge suggests a mode of construction which of course has much force; but I venture to think that if the result that I have arrived at is the correct one, force may be given to the section by holding that while a party had the right of proceeding against both husband and wife, he had the option, where it would be more convenient to proceed against the wife alone, as where the husband could not be conveniently served, or where he had no estate and the wife had the property, or where for any other reason, there was no desire to add him as a party defendant.

The provisions of the Imperial Act 45 & 46 Vict. ch. 75 "the Married Woman's Property Act of 1882," construed in *Seroka v. Kattenburg*, are quite different from those of our Act prior to 1884; but, it seems to me, they are rather more favourable to the defendant's argument than those of the statutes we have been considering.

In *Re March*, 27 Ch. D. 166, at p. 170, Cotton, L. J., said : Judgment.
“In my opinion the Act” (of 1882) “was not intended to Rose, J.
alter any right excepting those of the husband and wife
inter se.” See S. C. in 24 Ch. D. 222. Also *Re Jupp*, 39
Ch. D. 148 ; and *Re Dixon*, 42 Ch. D. 306.

Kay J., in *Re Jupp*, at p. 154, quotes the language of Cotton, L. J., above given, and expresses his concurrence therein.

In the above cases may be found a discussion of the effect of the statute on the unity of person between husband and wife.

I do not give formal judgment as I am informed that the case will be heard before me at the sittings in Hamilton next week, when I shall rule in favour of the plaintiff, and if the judgment is in the plaintiff's favour, the husband may review my ruling in a motion against the judgment and thus save the necessity for multiplied proceedings.

Were it not for the importance of the question I should not have thought it a convenient mode of proceeding in this case to have the question of law tried first, when the defendant had leave to both plead and demur.

The costs of this motion will be to the plaintiff in any event of the cause. (a)

(a) The case went down to trial at Hamilton in January following, when on answers by the jury to questions submitted to them judgment was entered for the defendant, which was not moved against.

[COMMON PLEAS DIVISION.]

REGINA V. BECKER.

*Sessions—Conviction—Appeal to Sessions—Dismissal of appeal with costs—
Certiorari—Right to—Witness fees—Power to allow—Defendant—
Admissibility of evidence of.*

Where an appeal to the Sessions is dismissed without being heard and determined on the merits, there is no power to impose costs.

Re Madden, 31 U. C. R. 333, followed.

When notice of appeal is given for the wrong sessions, and the appeal is not heard on the merits, the right to *certiorari* is not taken away by sec. 84, R. S. C. ch. 178.

Section 58 of the same Act authorizes justices of the peace to allow witness fees.

On an appeal to the Divisional Court, a conviction for unlawfully and maliciously pointing a loaded firearm at a person, was quashed on an objection taken for the first time, that the defendant who was called as a witness at the trial, was not a competent or compellable witness.

Regina v. Hart, ante p. 611, followed.

Statement.

THIS was a motion for a prohibition to James Robb, Esq., junior Judge of the county of Norfolk, the Chairman of the General Sessions of the Peace for the county of Norfolk, prohibiting him from enforcing a certain order made in the matter of a certain appeal to the said General Sessions, wherein one Alvin Becker was appellant and one Walter P. Ferris was respondent, whereby the said Becker was adjudged to pay certain costs—the ground taken being that the said sessions had no jurisdiction to make the said order; and also for a *certiorari* to remove into this Court a certain conviction made on the 25th of November, 1890, by Matthew C. Brown and Isaac Ketcher, two justices of the peace for the county of Norfolk, on the information of said Walter P. Ferris against the said Alvin Becker.

The copy of the conviction filed showed that on the 25th of November, Becker was convicted before two justices of the peace for the county of Norfolk, for that he, on the 6th of November, “at Long Point in the township of Walsingham, in the said county of Norfolk, did unlawfully and maliciously, and without lawful excuse, point at one James McLaughlin, a certain firearm, to wit,

a double-barrelled shot-gun, loaded with shot and powder, **Statement.** contrary" etc., for which said offence he was ordered to pay a fine of \$20, and also \$21.75 costs, to be levied by distress, and in default of sufficient distress, imprisonment for twenty days.

Notice of appeal from the said conviction was given, on the 25th of November, to the General Sessions of the Peace for the 9th of December, when the counsel for the appellant put in and proved the notice of appeal and recognizance: it having been arranged by counsel for the appellant and respondent, in the presence of, by the consent of Judge Robb, on the 8th of December,—the day prior to General Sessions,—that the hearing of the appeal should be fixed for the morning of Wednesday, the 10th of December.

On the 10th of December, objection was taken by counsel for respondent to the sufficiency of the recognizance filed, in that it did not provide for payment of the costs of appeal, and the appeal was dismissed on that ground with costs.

On January 17, 1891, *Du Vernet* supported the motions. The prohibition should be granted. There was no power to award costs of appeal: *Re Madden*, 31 U. C. R. 333; *Regina v. Padwick*, 8 E. & B. 703; *Regina v. Justices of Warwickshire*, 6 E. & B. 837. The case is analogous to that of a Division Court or County Court Judge when a question arises over which he has not jurisdiction; where, until expressly allowed by statute, he had no power to nonsuit or award costs. Then as to the *certiorari*. There was no power to make the allowances to the witnesses of the \$10.80. There is no clause in the Dominion Act, 52 Vict. ch. 45, allowing compensation to witnesses as in the Ontario Act, R. S. O. ch. 78. The magistrates had no jurisdiction, as it did not appear that Long Point was in the county of Norfolk, while the evidence shews that the offence was committed on Lake Erie, outside the jurisdiction of the magistrates, and within

Argument.

the jurisdiction of the Admiralty as being within the high seas. There was clearly a right to *certiorari*.

W. M. Douglas, contra. The Judge had power to award the cost of an abortive appeal. The prohibition should therefore be refused. The *certiorari* also should be refused. The allowance of the costs to the witnesses was proper. Under sec. 58 of R. S. C. ch. 178, justices of the peace have a discretion in awarding such costs as seem reasonable in that behalf, etc., and these costs were clearly reasonable: *Regina v. Brown*, 16 O. R. 41. The justices had jurisdiction to try the offence. The offence was committed at Long Point, in the township of Walsingham. By the R. S. O. ch. 5, sec. 24, the county of Norfolk consists of the township of Walsingham, including Long Point. Under sec. 84 of R. S. C. ch. 178, where there has been an appeal to the Sessions the right to a *certiorari* is taken away.

January 19, 1891. MACMAHON, J. :—

There has been no amendment to the statute since *Re Madden*, 31 U. C. R. 333, (1871), in which it was held by Wilson, J., upon the authority of *Regina v. Padwick*, 8 E. & B. 704, that the sessions had no power to award costs on dismissing an appeal for want of proper notice of appeal, holding that the words of the R. S. C. ch. 178, sec. 77 (d), "shall * * hear and determine the appeal," means decide it upon the merits.

The section of the Act to which I have referred (paragraph c.), requires that the recognizance entered into by the appellant with two sufficient sureties, amongst other things, shall provide that the appellant will "abide the judgment of the court thereupon," and "pay such costs as are awarded by the court." And, if the recognizance does not contain that provision, and is in consequence objected to by the respondent, the General Sessions is as powerless to entertain the appeal as if no recognizance had been entered into or filed. In order that the appeal may be heard the appellant must remain in custody until the

holding of the court to which the appeal is given, or enter Judgment. into the recognizance prescribed. See *Meyers v. Wonnacott*, MacMahon, 23 U. C. R. 611. J.

The respondent's counsel objecting to the recognizance, it was impossible that the appeal should be heard and determined on its merits; and, if not so heard, the sessions had no power over the costs. See also *Regina v. Recorder of Bolton*, 2 D. & L. 510.

Mr. Barber, in his affidavit filed on the motion, says he objected and urged that the Court had not any jurisdiction to award or direct that the appellant should pay the costs of the appeal.

In *Regina v. Crouch*, 35 U. C. R., 433, Richards, C. J., at p. 458, says, even "the omitting to raise the question of jurisdiction in an inferior Court does not prevent the party from applying for prohibition."

The applicant is I consider entitled to the order for prohibition.

As to the motion asking for a *certiorari*, the first ground taken was that the jurisdiction of the magistrates does not appear by the evidence.

The information shows the offence is charged to have been committed at the township of Walsingham. The caption to the depositions shows that the charge was being heard before two justices of the peace for the county of Norfolk, and was in relation to an offence said to have been committed at Long Point, in the township of Walsingham; and the witnesses for the prosecution speak of the alleged assault by Becker having been committed at Long Point, in the county of Norfolk, the justices for which county were hearing the case.

By R. S. O. ch. 5, sec. 24, (p. 24), the county of Norfolk shall consist, amongst other townships, of the township of "Walsingham (including Long Point)."

Then as to the objection raised as to witness fees allowed by the magistrates as part of the costs. Justices of the peace under the R. S. C. ch. 178, sec. 58, have a discretion in awarding costs, as to them "seems reason-

Judgment. able in that behalf, and not inconsistent with the fees
MacMahon, established by law to be taken on proceedings had by and
J. before such justices."

"The Summary Convictions Act" was amended by 52 Vict. ch. 45, (D.), and the 2nd section of the amending Act gives a schedule of fees to be allowed and taken by justices of the peace or their clerks in proceedings before them; and also a schedule of constables' fees allowed in such cases, as part of the costs awarded. This tariff contains no tariff of witness fees, and deals only with the two classes of fees mentioned; leaving the question of witness fees to be governed by the 58th section of the Act, as being costs "not inconsistent with the fees established by law."

There was therefore no excess of jurisdiction on the part of the magistrates in including the witness fees as part of the costs. See *Regina v. Brown*, 16 O. R. 41, at p. 47.

Under sec. 84 of the "Summary Convictions Act," R.S.C. ch. 178, where there has been an appeal to the sessions, the right of *certiorari* is taken away, and the service of notice of appeal is the first proceeding on an appeal from a conviction: *Regina v. Lynch*, 12 O. R. 372; but, as in this case the conviction was within fourteen days of the next sessions, (formerly twelve days), and notice of appeal was given to such sessions instead of to the second sessions after the conviction, and the appeal was not heard, *i.e.*, not heard on the merits, there was in effect no appeal and the right of *certiorari* was therefore not taken away; *Regina v. Caswell*, 33 U. C. R. 303.

However the applicant has made out no case for the issuing of a *certiorari* here; and that part of the motion must be refused.

As each party has been successful as to part of the motion, there should be no costs.

From this judgment an appeal was had to the Divisional Court composed of GALT, C. J., and ROSE, J.

Du Vernet, for the appeal.

W. M. Douglas, contra.

In addition to grounds raised before the Judge appealed from, it was objected that the defendant was not a competent witness, and, as his evidence was taken, the conviction, should be quashed on this ground; and *Regina v. Cliff*, 19 L. T. N. S. 47, and *Regina v. Hart*, ante p. 611, were relied on. Argument.

March 6, 1891. ROSE, J.:—

This was an appeal from an order of my learned brother MacMahon refusing a *certiorari*.

On the argument before us, a ground not taken before my learned brother, was relied upon by the defendant—namely, that he was examined as a witness on his own behalf, and was cross-examined.

Mr. Douglas urged that we should not give effect to that objection as it had not been taken on the original motion.

I should be pleased were we able to refuse to yield to the objection, but I think we must allow it to be taken.

In *Garrett v. Roberts*, 10 A. R. 650, Osler, J. A., delivering the judgment of the Court said, at p. 652, with reference to an objection there raised: "The objection was not raised at the trial, or on the motion for judgment, but we think it still open to the defendant on the appeal in arrest of judgment."

And again, at p. 655: "We think, therefore, that the appeal should be allowed, but without costs, as the objection we give effect to might have been taken at the trial or even at an earlier stage of the case; and the action dismissed, with costs."

We must, therefore, consider the objection. Mr. Douglas stated that if, in our opinion, the objection was a valid one, he was content that the motion should be turned into a motion to quash the conviction, and be so treated.

The defendant tendered himself as a witness on his own behalf, and was so examined, and he was cross-examined on the part of the prosecution. There is no merit in his objection, as the evidence for the prosecution was, in our

Judgment. opinion, quite sufficient to warrant the conviction. I could
Rose, J. not say, however, even if it made any difference, that the statements of the defendant did not afford evidence which would influence the mind in favour of conviction.

Mr. Du Vernet relied upon our recent decision in *Regina v. Hart*, ante p. 611, and also cited *Regina v. Clegg*, 19 L. T. N. S. 47.

In that case, Hannen, J., held that an indictment for perjury could not be sustained where the prisoner had given evidence in a former proceeding against himself, the ground of the ruling being that it was not competent for him to give evidence. In the case in which he had given evidence, the prisoner Clegg represented himself as the son of the defendant, and thus imposed upon the magistrates, who administered the oath and received his evidence. Notwithstanding this trick, Mr. Justice Hannen thought, I suppose, that, as it was not competent for him to give evidence, there was not authority to administer the oath, and therefore that perjury would not lie. The note to the judgment is very brief, and I do not find the case referred to elsewhere. If the question comes up squarely for determination, *Regina v. Hughes*, 4 Q. B. D. 614, may be referred to.

I have considered whether we might not support the conviction on the ground that was taken by the counsel in *Regina v. Clegg*, that "it was just the same as if no evidence had been given by him at all;" but I fear it would not be in accordance with the well-known principles relating to the giving of evidence, and to the influence upon the mind of any statements made during the progress of the trial, that should not have been received, if I were to adopt any such view.

I refer to cases collected in *Connée v. Canadian Pacific R. W. Co.*, 16 O. R. 639; *Regina v. Hagerman*, 15 O. R. 598; *Regina v. Gibson*, 18 Q. B. D. 537, referred to in *Regina v. Hagerman*, 15 O. R. 598; *Regina v. Petrie*, 27 C. L. J. p. 59, recently decided by the Justices of the Queen's Bench Division on a case reserved. *

* Reported 20 O. R. 317.

In *Regina v. Gibson*, an objection having been raised as to the admissibility of certain evidence, counsel for the prosecution urged before the Court that the objection should not be given effect to, because "the evidence was given voluntarily as an addition to an answer to a proper question, and no objection having been taken at the time by the prisoner's counsel, that it was too late for him to take it after the chairman had summed up and the jury had retired." He further urged that "the case finds that there was ample evidence of identification besides the woman's statement to go to the jury; and there is authority to show that a conviction ought not to be quashed on the ground that some evidence has been improperly admitted, where there was other evidence properly admitted and sufficient to support the conviction."

Judgment.

Rose, J.

The learned Judges examined the authorities referred to, and held that none of them supported the proposition of counsel.

Lord Coleridge, C. J., said, at p. 540, "The prisoner was defended by counsel, who in the exercise of his discretion did not object to the admissibility of the evidence at the time it was given. It is immaterial to consider whether counsel exercised his discretion rightly or wrongly * * I am of opinion that the true principle which governs the present case is, that it is the duty of the Judge in criminal trials to take care that the verdict of the jury is not founded upon any evidence except that which the law allows. Here evidence which was at law inadmissible was allowed to go to the jury."

Mr. Justice Wills said, at p. 543: "I agree that the course taken by the counsel has no bearing upon the question before us. If a mistake had been made by counsel, that would not relieve the Judge from the duty to see that the proper evidence only was before the jury. It is sometimes said—erroneously as I think—that the Judge should be counsel for the prisoner; but at least he must take care that the prisoner is not convicted on any but legal evidence."

Judgment.

Rose, J.

In accordance with our opinion expressed in *Regina v. Hart*, it is clear that this conviction cannot be supported, and it must be quashed; but, as we have formed no opinion in favour of the defendant on the merits, without costs, and the usual order for protection will go.

GALT, C. J., concurred.

[CHANCERY DIVISION.]

HALL V. HALL.

Donatio mortis causa—Delivery of keys of box and rooms containing valuables—Sufficiency of evidence.

Shortly before his death the plaintiff's uncle delivered to her his watch and pocket-book, and also the keys of his cash box, which was then in actual possession of his solicitor, and of two rooms, in which were contained securities for moneys and chattels, accompanying the delivery with words of gift, having reference to the articles actually delivered.

The plaintiff claimed a *donatio mortis causa* :—

Held, [reversing the decision of ROSE, J., reported 20 O. R. 168,] that as regards the contents of the box and the property in the rooms, the alleged gift had not been made out, and no *donatio mortis causa* was established, otherwise decision of ROSE, J., affirmed.

Statement.

THIS was a motion on behalf of the defendants by way of appeal from the decision of ROSE, J., in this case, declaring that a certain gift was a void *donatio mortis causa*, reported 20 O. R. 168, where the facts are sufficiently stated.

The motion was argued on January 15th, 1891, before FERGUSON and MEREDITH, JJ.

Bicknell, for the defendants. Supposing that on the day after the gift the deceased had sent an order to the solicitor for the box, the latter would have had to return it. It was in the solicitor's possession as agent for him. Was the delivery of the key of a box which is in the possession of another as agent of the donor of the key, actual delivery within the meaning of the recent case of *Cochrane v.*

Moore, 25 Q. B. D. 57. There is no reported case in which Argument. delivery of the key, where property was at a distance, has been held sufficient to make a *donatio mortis causâ*. An absolute manifest intention is necessary. Again, a mortgage is merely a symbol of a debt; it is capable of delivery; but the actual thing given, is the debt and the security on the land, and there is no case on record, that delivery of a key would pass the debt as a *donatio mortis causâ*. Again, the actual delivery should have been corroborated: *In re Finch v. Finch*, 23 Ch. D. 267. We also cite *Jones v. Selby*, *Finch's Prec. Ch.* 300; *Hatch v. Atkinson*, 56 Me. 324; *Young v. Derenzy*, 26 Gr. 509; *Ward v. Turner*, 1 W. & T. L. C. 6th ed., 1058; *Re Taylor, Taylor v. Taylor*, 56 L. J. Ch. 597; *Farquharson v. Cave*, 2 Coll. 356; *S. C.*, 10 Jur. O. S. 63; *In re Dillon, Duffin v. Duffin*, 59 L. J. Ch. 421; *S. C.*, 44 Ch. D. 76; Articles on *Donationes Mortis Causâ*, 90 L. T. p. 140, and in 21 Am. Law Rev. pp. 732, 787; *Duffield v. Elwes*, 1 Bli. N. R. 497; *Cosnahan v. Grice*, 15 Moo. P. C. 215; *S. C.*, 7 L. T. N. S. 82; *Freeman v. Freeman*, 19 O. R. 141.

Holman, for the plaintiff. The dominion over the property was represented by the key. With regard to the property in the room, it was in the custody of the deceased by virtue of his having locked it up. The property was given by the deceased in the only practicable way. The question is not the actual delivery, but the intention. Every case must depend upon its own circumstances, and what occurred therein. If the giving of the key imputed the dominion, this was all the donor could do. We cite *Wariner v. Rogers*, L. R. 16 Eq. 340, 353; *Bunn v. Markham*, 7 Taunt. 223; *Travis v. Travis*, 12 A. R. 438; *Smith v. Smith*, 2 Str. 955; *Coleman v. Parker*, 114 Mass. 30; *O'Brien v. O'Brien*, 4 O. R. 450; *Parker v. Parker*, 32 C. P. 113; *Payne v. Marshall*, 18 O. R. 488; *McDonald v. McKinnon*, 26 Gr. 12.

Judgment. February 18th, 1891. FERGUSON, J. :—

Ferguson, J.

The question here is whether or not there was a good gift *mortis causa*d of the contents of the box, and the articles in the room.

The learned Judge had no difficulty in regard to the pocket-book which with its contents was handed by the deceased to the plaintiff. At the argument there was not much contention as to this pocket-book, and what it contained. The understanding of my brother Meredith is that the defendants gave up the contention as to this, and I think the conclusion of the learned Judge should not be disturbed as to the pocket-book and its contents. The watch which it was said was given the day before these alleged gifts is not a matter embraced in the action.

The learned Judge has set forth with I think accuracy and sufficient fulness the parts of the evidence that are material to the consideration of the question as to whether or not there was a good gift of the other property in question, namely, the contents of the box and the personal property in the room, the box and the room being in Dunnville, and the deceased in his last illness being in Niagara. I need not, I think, repeat this evidence here, the judgment of the learned Judge being now in print.

Apart from the evidence of the plaintiff herself there is, I think, evidence of the general intention of the deceased to make a gift, or gifts, to the plaintiff on account of her attention to him. This may not, under the circumstances, be of much force in respect of what has now to be determined; still it exists. The property is of large value, some \$9,000, it was said. Of this the contents of the pocket-book is no inconsiderable share, and might be considered sufficient to satisfy a reasonable expectation or conjecture respecting the amount or value of gifts pursuant to the intention spoken of. The evidence of Mrs. Robinson happens to be in a very peculiar position; the deceased thinking he was speaking to the plaintiff, when in fact he was not, said, the day after the alleged gift: "*Fanny, it is*

all yours; be sure you keep it, and do not let it out of your possession." This expression is very general indeed, ^{Judgment.} Ferguson, J. and, given full force and credence, would seem to have reference to the whole of something that had before been given, or to the whole of the estate of the deceased. It is, I think, though very peculiarly circumstanced, some evidence that there had been some gift, or attempted gift, by the deceased to the plaintiff, but there cannot be any pretence that it had any specific reference to the property in the box or in the room.

As to the alleged giving of the keys, and what is alleged to have been said at the time by the deceased, the evidence of the plaintiff stands alone; by which I mean that no other witness speaks of them, and although there may well be the corroboration, in a general way, to which allusion has been made, yet it is plain that a large amount of property—amounting to several thousands of dollars—is to pass to the plaintiff or not, the question depending not only upon her sincerity, but upon the accuracy of her perception and understanding of what she says was done and said, and the strength of her recollection in regard to these when she gives her testimony now, as well as upon the meaning and legal effect, if all is taken to be correctly and accurately stated by her.

The language of the deceased (as given by the plaintiff), at the time she says the keys were given her, is, as will be perceived, of a very general character, and mentions the keys only. There were no words of gift of the box or its contents, or of the contents of the room. No article in the one or the other was mentioned; nor was there any general expression used comprehending these. The words employed at that time, as stated by the plaintiff, would seem to have reference to the keys only, or the keys and pocket-book. The deceased did not say what the keys were the keys of, and there were two other keys in the same bunch. The plaintiff did not know then, nor until she had learned after the death of the deceased, what the keys, by virtue of the delivery of which she now claims, were the keys of.

Judgment.
Ferguson, J.

The circumstances of the case seem to invite one to refer to the language employed in the judgment in the case *Hatch v. Atkinson*, 56 Me. at p. 326, though the same language, or language of similar import, is found in very many places in the books and reports of cases. It is this :
✓ "Gifts *causâ mortis* are not favoured in law. They are a fruitful source of litigation, often bitter, protracted and expensive. They lack all those formalities and safeguards which the law throws around wills, and create a strong temptation to the commission of fraud and perjury. Lord Hardwicke declared, more than a hundred years ago, that it was a pity the statute for the prevention of frauds and perjuries did not set aside all such gifts. Justinian was so justly apprehensive of fraud with respect to them, that he required them to be made in the presence of five witnesses. If the law limited such gifts to articles of small value, and required the gift to be executed in the presence of disinterested witnesses, they would be less objectionable. But if large estates, amounting to thousands of dollars, may be thus disposed of, and the title of the donee supported mainly by his own testimony, and that of near relations, the public feeling of security may well be startled. Unfortunately the common law has not adopted any of these precautions. It does not require the gift to be executed in the presence of any stated number of witnesses; nor does it limit the amount of property that may be thus disposed of. But it does require clear and unmistakable proof, not only of an intention to give, but an actual gift, perfected by as complete a delivery as the nature of the property will admit of." * * "And public policy requires these rules to be enforced with great stringency, otherwise the wholesome safeguards of our testamentary laws become useless. It is far better that occasionally a gift of this kind fail, than that the rules of law be so relaxed as to encourage fraud and perjury."

In *White & Tudor's L. C.*, in the notes to *Ward v. Turner*, 1 W. & T. L. C. 6th ed., p. 1058, it is said to have

been laid down in *all* the cases in which the Judges have commented on the evidence necessary to support a gift *mortis causæ*, that it must be established by clear evidence. The proof must be more than is required merely to turn the scale in favour of two equally probable conclusions. It must establish to the satisfaction of the Court that the claimant's case is not only probable, but reasonably free from doubt.

In *Casmahan v. Grice*, 15 Moo. P. C. 215, observations are made as to the danger of the Court acting on the evidence of the claimant alone. Without any intention to commit perjury, there is a natural tendency in the human mind to believe that which we wish. A very slight change—perhaps a single word—may make a very material difference in the meaning of the language deposed to. There is great danger of it being misrepresented by any witness from being originally misunderstood or inaccurately remembered; but a claimant proving his or her own case, has to guard against an additional tendency to both sources of error.

The case *Cooper v. Burr*, 45 Barb. p. 9, was rather the case of a gift *inter vivos* than *mortis causæ*. It was supported. There, however, there was a gift of the property as well as the keys, the donor mentioning the trunks and bureau of which the keys were the keys. In that case it was said that either an actual or a symbolical delivery would be sufficient. In the present case counsel conceded that a symbolical delivery would be insufficient, but contended that there was an actual constructive delivery.

In *Jones v. Selby*, Finch's Prec. Ch. 300, there was a gift of the trunk and its contents and a delivery of the key.

This is a subject upon which there is a very large number of decisions. I have perused very many of these with the view of arriving at a proper conclusion in the present case. It would lead to no good so far as I can see to endeavour to refer to them even in the briefest possible manner here.

Judgment.
Ferguson, J.

Judgment. It is often said that the burden of proof is on the donee, and he must show that the subject matter of the gift was handed over to him, and that the transfer was made with intent to pass the right of property, and a large number of American cases show that ambiguous expressions will be interpreted against the donee and in favour of the legal representative of the donor.

It is laid down in a general way that in all cases of gifts *mortis causa*, an intention to give and a delivery must concur, either being sufficient without the other. It is sometimes said that there must be actual delivery; but it appears, I think, that constructive delivery will be sufficient, and the equivalent of actual delivery. In the present case it was contended that the delivery of the keys was, under the circumstances, a good delivery, it being the only delivery that the deceased could make.

It is I think to be borne in mind that gifts of this nature, as said in the notes to *Ward v. Turner*, 1 W. & T. L. C. 6th ed. 1058, depend not upon an equitable but a legal title, and that the claim of the donee is not essentially an equitable right.

It seems to be a claim that must be fully made out in regard to title, though perhaps the difference between the legal and equitable right may have to some extent vanished by reason of recent changes in the law.

The learned Judge says: "From the evidence I conclude that the deceased intended to make gifts to the plaintiff, and that in pursuance of his intention he gave her his watch, pocket-book and contents, and keys." This is a finding of fact, but it appears to me to be depending more or less upon inference of fact from other facts taken to be established. The learned Judge also says that he had no difficulty in regard to the pocket-book, and that the watch was not in question, that the difficulty he had was as to the contents of the box and the furniture in the room, the keys of which box and room were given to the plaintiff. He says that upon the whole he came to the conclusion that he should not be giving the effect intended by the

deceased to his language when he gave the keys to the plaintiff if he did not hold that he intended to give her what the keys placed under her control; and after that there is the finding that the deceased intended to, and did in fact part with both the possession of and dominion over the box and its contents, and of the rooms and their contents when he gave the keys to the plaintiff, and the opinion expressed that the deceased was dealing with the keys as he had done with the pocket-book and the watch, and that the intention was the same as to all.

Judgment.
Ferguson, J.

This is, I think, again a finding depending more or less upon inferences of fact also, and if this is so one is not bound by these findings to the same extent as if they stood upon the degree of credence awarded to witnesses or in cases of conflicting testimony. Now the plaintiff must make out a title. To accomplish this there must appear the intention to give and the gift must be consummated by delivery. These must be shewn by clear and unmistakable proof. It must be more than is sufficient to turn the scale in favour of two equally probable conclusions and any ambiguity must be interpreted against the plaintiff. The language used in making the alleged gift, even if taken to be given with entire accuracy at the trial, contains not one word or syllable as to the property in the box or in the room, the words of gift, such as they are, appertained to the keys only, and one may or may not draw the inference that the intention was to give the property, or that the intention was that the keys should be kept safely for those who would become entitled to them.

I am unable to convince myself that it is proved by evidence, such as is required in cases of this sort, that the intention was to give the property in the box and that in the room. I am quite aware that there is room and perhaps ample room for an opposite view, and I feel much delicacy in departing from the view taken by the learned Judge, but I am bound to express my own opinion on the subject.

Again, assuming that the intention is sufficiently shewn.

Judgment. there may be the further difficulty regarding delivery, for the plaintiff has to make title, so to speak. Now, it might be said that if there was the intention to give this property then the delivery of the key would in the circumstances be all that could be expected by way of delivery of the property. I have seen no case in which the gift and delivery of the key have been held a good gift *mortis causâ* of the property; and it appears to me that what is meant by the cases in which the delivery of the key is held sufficient is this: That where the words of the gift reach the property itself, in other words, where the property is without doubt the subject of the gift according to the words of gift and then instead of delivering the property the key of the trunk or box in which it is, is delivered this may do, as where the donor says I give you a certain trunk or box and all the property in it, or all the contents of it, and he delivers the key of the trunk or box, in some circumstances this is sufficient. I cannot see that a gift, in words, of a key and delivery of that key will operate as a good gift *mortis causâ* of all that may be contained in any room, box, trunk, or chest, or safe, belonging to the donor that such key may open or be the key of. I think there is no case going so far as this, and I do not think it is enough to say that there is no case the contrary of it.

On the whole case I am of the opinion that the judgment should be reversed, except as to the pocket-book and contents of it; that is to say, that the alleged gift has not been made out as to the contents of the box or the property in the room.

All circumstances considered, I am of opinion that the costs may be out of the estate, though I do not desire to be understood to be of the opinion that in all or indeed in many cases in which a gift *mortis causâ* is set up and fails the costs should be out of the estate or that in most cases the claimant may not, in respect to costs, occupy just the same position as any other litigant who fails upon the issue.

MEREDITH, J. :—

Judgment.

Meredith, J.

Assuming nothing against the plaintiff, or the witness Sarah Robinson ; crediting them with a desire to tell, as accurately as their memories permitted, all that was said and done, but bearing in mind, as one must, the natural tendency of the mind to believe that which is desired, and to tell, even unintentionally, the story in its own favour, I am quite unable to find, in the testimony in this case, that full and unambiguous evidence of intention, properly required in case of this kind, to sustain the plaintiff's claim to the property now in question, as she claims it, as a valid gift *mortis causa*.

The probabilities, too, seem greatly against the claim. Joseph Hall must have, like the most of us, had the notion that the disposition of all his property, to take effect upon death, must, to be valid, be by will, the formalities of which he seems to have known. No good reason has been suggested why, if there was really an intention to make over all this property absolutely to the plaintiff, that intention was not expressed in writing. Many reasons can be suggested why, if such were the intention, it would have been expressed only in that way. It is improbable that if such were the intention, no word would have been spoken to indicate what was being given, its nature, its amount, where it was to be found, or how obtained, no word to make plain the meaning of the handing over of the bunch of keys, nor to indicate which of them were valuable and which of no value, no one called to bear witness to the gift.

The plaintiff's own story is as vague as this :—

“ Q. Then at the time this pocket-book was handed to you he did not say anything about it, about the contents ?

A. No.

“ Q. Did not say anything about the notes, or about the amounts, or anything of that kind ? A. Not a word.

“ Q. And the keys, he said nothing at all about ; what they were keys to ? A. Not a word. * *

Judgment.

Meredith, J.

"Q. You did not know what he had given? A. No.

"Q. No idea in the world? A. Not the slightest.

"Q. You simply knew that you had got some keys, and the watch, and this pocket-book? A. Yes. * *

"Q. Did you, or did you not, know what the keys were the keys of at the time? A. No, I did not."

I do not attempt to exhaust, but merely touch upon, the improbabilities.

I am quite unable to satisfy my mind that the words said to have been used, and the acts said to have been done, convey an unequivocal meaning to give, absolutely, to the plaintiff, the property now in question, which was never mentioned or referred to directly or indirectly, and of the very existence of which the plaintiff remained unaware until after the death.

If a gift of the whole of a man's property, valuable, and of such a nature, as this was, is to be sustained upon such evidence, it seems to me that a very serious blow will be struck at the primary purposes of the Wills Acts, which, besides the writing and signature, have always required the witness of at least two persons not beneficially interested.

I have said the whole of the man's property, because it is a mere chance that the mortgages not claimed were not in the tin box with the others.

Having formed so strong an opinion against the plaintiff's claim upon this ground, I have not further considered the other, to say the least of them, formidable objections to it.

The pocket-book, promissory notes, ready money, and gold watch, referred to in the plaintiff's testimony, are not now in question, the defendants having consented to the plaintiff having judgment for them, without prejudice to their case as to the other property.

I would therefore set aside the judgment moved against, except as to plaintiff's having costs out of the estate, and direct judgment to be entered, by consent, for the plaintiff as to the pocket-book, promissory notes, ready money, and

gold watch, and against her as to the rest of the property in question. The costs of the plaintiff may perhaps fairly come out of the estate of the intestate, whose failure to leave his property in a more settled and certain state may have been, in a measure at all events, accountable for this litigation.

Judgment.
Meredith, J.

A. H. F. L.

[CHANCERY DIVISION.]

R. BICKERTON AND COMPANY V. DAKIN.

BIGGINS, CLARKSON AND COMPANY V. DAKIN.

Lien—Mechanics' lien—Partnership—Claim of lien registered in name of, after dissolution—R. S. O. 1887, ch. 126, secs. 16, 19—"Claimant"—"Person entitled to the lien"—53 Vict. ch. 37 (O.)—Jurisdiction of High Court—Joining liens—Statement of claim under 53 Vict. ch. 37, sec. 2, (O.)—Amendment.

A claim of lien under the Mechanics' Lien Act was registered and proceedings to enforce it were taken in the name of a firm which had been dissolved and one of the members of which had died prior to the registration. The materials for which the lien was claimed were, however, all furnished by the firm before the dissolution or death, and it was provided that the dissolution was not to affect this and other engagements.

Sec. 16 of R. S. O. 1887, ch. 126, under which the lien was registered, refers to the "claimant" of the lien, and sec. 19 to the "person entitled to the lien." The Interpretation Act, R. S. O. 1887, ch. 1, sec. 8, sub-sec. 13, does not specifically include in the word "person" the words "firm" or "partnership":—

Held, that the lien attached on the land, and was validly continued; the difficulty as to the word "person" was overcome by the use of the alternative word "claimant," which extended to a partnership using the firm name in the registration of the lien.

Under the Act to Simplify the Procedure for Enforcing Mechanics' Liens, 53 Vict. ch. 37 (O.), it is competent to join liens so as to give jurisdiction to the High Court, though each apart may be within the competence of an inferior Court.

The plaintiffs in proceeding under 53 Vict. ch. 37, to enforce their lien, filed with a Master as the "statement of claim" mentioned in sec. 2, a copy of the claim of lien and affidavit registered, verified by an affidavit, and the Master, thereupon, issued his certificate:—

Held, that if this was insufficient in form an amendment *nunc pro tunc* should be allowed, for the claims were substantially in compliance with the Act.

Decision of Boyd, C., 20 O. R. 192, affirmed.

THIS was a motion by the defendant Nesbitt by way of appeal from the decision of BOYD, C., upholding the pro-

Statement. proceedings taken to enforce a mechanics' lien, reported 20 O. R. 192, where the facts are sufficiently stated.

The motion was argued on January 14th, 1891, before FERGUSON and MEREDITH, JJ.

Aylesworth, Q.C., for the defendant Nesbitt. First, we contend that there is no right or power to amend against an objection that the proceedings have never been instituted in a way that can be recognized by the Court. There was no statement of claim within the Mechanics' Lien Act and there is no power to amend. This is a statutory proceeding. It is not to be "deemed an action" under section 38 of 53 Vict. ch. 37, (O.), until properly instituted. Before the plaintiff has effectually invoked the aid of the Court, he must have taken the essential proceedings which are a condition precedent. There is no reference to Nesbitt in the initial proceedings. BOYD, C., holds that the surviving partners can use the name of Bickerton & Co., on the ground that this was one contract. We say this was not so. On the dissolution on April 17th, the firm was entitled to any rights they had against Dakin; on the death of one of them entitled to the lien, Bickerton, his right went to his personal representative, (R. S. O. 1887, ch. 126, sec. 25) who was in no sense a member of the firm of Bickerton & Co. To say the truth, the Act does not seem to have contemplated a claim being made by a firm. "Person," under the Interpretation Act, does not include a partnership: R. S. O. 1887, ch. 1, sec. 8, sub-sec. 13. The authorities are against rather than in favour of taking such mechanics' lien proceedings in the name of the firm: *Davis v. Church*, 1 Watts & Serg. (Penn.) 240; Lindley on Partnership, (Black. ed.) p. 115, *n.* No matter what agreement there was to the contrary, the death of Bickerton dissolved the partnership: *Bell v. Nevin*, 12 Jur. N. S. 935.

Masten, for the plaintiffs. If the statement of claim is preliminary and outside the action, it is not a pleading as

contended. If on the other hand, it is a pleading within Argument, the action, then it is amendable. The action begins under the Act, not by the statement of claim, but by the registration of the certificate. There is no pleading filed. *Davis v. Morris*, 10 Q. B. D., 436, now embodied in Rule 317, shews we were entitled to proceed in the firm's name. As to whether "claimant" in section 16 is satisfied by inserting the name of a firm instead of that of a person, we rely on *Black's Appeal*, 2 Watts & Serg. 179; *Busfield v. Wheeler*, 14 Allen 139.

Aylesworth, in reply. The statement was, at all events, to be some document to place the officer of the Court in possession of the material facts on which he should base his certificate. Nesbitt's name was no where mentioned.

February 18th, 1891. FERGUSON, J. :—

The 2nd section of the Act 53 Vict. ch. 37, provides that a plaintiff may, without issuing a writ of summons or taking any other preliminary proceeding, file a statement of claim in the office of the Master or Official Referee having jurisdiction in the county wherein the lands in question are situate. Upon receiving this, properly verified, the Master or Referee is, by the third section, to issue a certificate, in duplicate, of the filing of the same; and upon the registration of this certificate as required by section 4 of the statute, the action is to be deemed to have been commenced.

In and by this certificate, the Master or Referee is, by section 5 of the Act, to appoint a time and place at which he will inquire into the claim of the plaintiff and take all necessary accounts. By section 7, any person served with the certificate and appointment, may, within ten days, file a notice disputing the plaintiff's right to a lien. The Act then provides for the necessary proceedings and inquiries before the Master or Referee, in order to ascertain what are the rights of the parties to the contention, etc.

The first objection urged before us, was that the paper

Judgment. in each of these cases which was filed with the Master
Ferguson, J. before the issuing of his certificate under section 3, was not a statement of claim within the meaning of that expression in section 2. It was contended that the paper should be a formal statement of claim, such as the pleading known by that name in an ordinary action since the coming into force of the Judicature Act; and if this is the proper view, there can be no doubt that the papers in question are not of that character, for they cannot be characterized as pleadings at all.

The paper in each case is, however, called on its face a statement of claim. The heading is, "Mechanics' Lien, Statement of Claim," and it is conceded that it contains all the information respecting facts that would be found in a statement of claim drawn in the form of a pleading such as it is contended there should have been in order to comply with the requirements of the statute.

It is to be observed that the statement of claim mentioned in section 2 is a paper having its existence and apparent use before the commencement of the action, for by section 4 the action shall be deemed to have been commenced upon the registration of the certificate which is issued after the filing of the statement of claim, and it is further to be observed that no pleading in answer or reply to this statement of claim is contemplated by the Act. Looking at the matter in this way one would scarcely say that a document intended to fill the place of what is called in section 2 a "statement of claim" would require to possess the technical formalities of a pleading in an action.

The paper in each of the present cases does claim a lien upon the estate or interest in the land. It describes the land, and states the amount for which the lien is claimed, as well as the way in which the debt or claim arose or is alleged to have arisen, and as before stated contains all the information regarding facts that would appear in a formal pleading, and appears to me entirely different from the case of only an account having been brought in not mentioning or describing the lands or saying that a lien is claimed.

Apart from the questions raised as to the names of the firms being used, and as to the death of Mr. Bickerton, the contention in favour of the sufficiency of these papers as statements of claim within the meaning of section 2 of the Act seems to me to be very strong, and I think well founded. I cannot avoid being of the opinion that they are (considered apart from such questions) substantially what is required ; yet if it is thought that amendments of mere form are necessary, I do not see any objection to it.

Then as to the name of the style or firm being employed, and not the names of the individual members of the firm, there can, I think, be no doubt that a firm may furnish materials and a debt arise to the firm for the price of the same. A mechanics' lien arises under the provisions of section 4 of the Act, ch. 126, R. S. O. (1887), in favour of those or any of them described in the section. One of those mentioned is defined as "contractor." This would surely include a firm of contractors who furnish materials, and I think there is nothing against saying that assuming these firms to have furnished materials in such a manner as would be sufficient to give a lien in favour of a single person, had he done so, that liens arose by force of the Act in their favour respectively. Assume then that the liens really existed, the next question seems to be, were they properly registered ? The objection again is, that the firm name is used, and not the names of the individual members of it.

What, in this respect is required by the 16th section of R. S. O. (1887), ch. 126, is the name and residence of the "claimant."

The statute under which *Black's Appeal*, 2 Watts & Serg. 179, referred to in the judgment of the Chancellor was decided, required filing of the claim in the office of a prothonotary, as appears by a perusal of the case. The words of that statute, were the names of the "party claimant," and the decision was that the use of the firm name in the mechanics' lien filed, was a sufficient designation of the claimants. I think the reasoning in the judgment in that

Judgment. case may be safely adopted ; and if so, I do not see any good
Ferguson, J. reason for saying that the registrations of the liens in the present cases, are defective or bad, for the reason that the firm names were used, and not the names of the individual members of the firms.

An action might have been brought under the provisions of Rule 317, in the name of the firm for the price of the materials furnished.

The 25th section of the Act, R. S. O. (1887), ch. 126, provides that upon the death of a lien-holder, his right of lien shall pass to his personal representative, indicating that, although the lien is a right affecting lands, it is in essence to be considered as personal property. The case *Maugham v. Sharpe*, 17 C. B. N. S. 443, shows that an assignment of personal property may be in favour of a firm and taken in the firm name. Any other security on chattels might have been taken in the name of the firm, and would have enured to the benefit of the partners respectively.

A further contention was that in one of these cases the firm had been dissolved, and thereafter and before the registration of the lien, and before any proceeding was had Mr. Bickerton died. At the time however of the dissolution of this firm by contract, it was agreed as part of the contract of dissolution that the firm should nevertheless continue for the purposes of completing or finishing the business of the firm, and that in doing this the firm name should be used. This contract, I take it, was binding upon each member of the firm, each, of course, being a necessary party to it, and, if so, it was binding upon any personal representatives of Bickerton. According to the case *Busfield v. Wheeler*, 14 Allen 139 (also referred to by the Chancellor), a lien which has accrued to a partnership for work done and money expended is not lost by the dissolution of the firm, and the assignment by one party of his interest therein to another, but in such a case the partner to whom the claim and lien have been assigned may enforce the same in the name of the firm. In the

judgment it is said that all proceedings for the enforcement of the claim must be had in the name of the copartnership notwithstanding the dissolution, etc. Judgment.
Ferguson, J.

The agreement made at the time of the dissolution of the Bickerton firm, before referred to, seems to me to take the case out of the operation of the principle referred to and acted on in the case *Davis v. Church*, 1 Watts. & Serg. 240, if, under all the circumstances, that principle would otherwise have been applicable. See also the case *Gordon*, appellant, and *Douglas, Heron & Co.*, respondents, 3 Paton's Scotch Appeal Cases, 428, where it was held by the House of Lords that every copartnership must from its nature subsist after its dissolution to the effect of winding up its affairs, supposing there were no provision in the contract to this effect, but in that case there was in the contract a special provision for this purpose, and therefore the title to sue was held unexceptionable.

It appears to me that the difficulties or supposed difficulties in the way of the plaintiffs are fairly met in this way.

The case is one in which the judgment should be upheld if reasonably possible. The present owner of the property purchased with full notice of all the facts. This was admitted in the clearest terms at the bar. He is now trying to have the property freed from any of these liabilities, for purely technical reasons, and unless it is shewn to be entirely clear that he has the right to succeed he should not be permitted to do so. On the whole case I am of the opinion that the judgment should be affirmed, but I think without costs.

MEREDITH, J. —

It is admitted that these claims are such as were intended, by the mechanics' lien legislation, to be secured upon and payable out of property benefited by a claimant's work or materials. They are claims clearly within the remedy intended to be given, to the holders of such claims, by the Acts.

Judgment. But it is sought to defeat them upon two purely technical grounds :
Meredith, J.

1. Because the claims were registered in the partnership names and not, in the one instance, in the individual names of the surviving partners, and in the name of the legal personal representative of the deceased partner ; and, in the other instance, in the individual names of the partners ; and,

2. Because the proceedings upon which the certificate under the 3rd section of the Act of 1890 was obtained, were insufficient ; and there is, it is contended, no power to amend them.

These essentially remedial Acts are to be given such fair, large and liberal construction and interpretation, as will best ensure the attainment of these objects. Effect ought not to be given to technical objections, founded upon matters which in no way have prejudiced, or could prejudice, any one. The objections come from one who purchased, and took his conveyance of the property, not only after, and with actual notice of, the registration of the claims, but also with full knowledge of all the facts.

In the first case, the whole claim arose, the whole of the material was furnished, before the death of the partner, Ralph Bickerton ; and, although the last item was supplied after dissolution of the firm, by the express terms of such dissolution, the old firm, under the same name, was to continue as before until its unfinished business, including this transaction, should be completed and its debts paid, and claims and assets collected and realized, so that, in the lifetime of the three partners, trading under the name of " R. Bickerton & Co.," and in such continuance of the firm's business, a lien attached, by virtue of "The Mechanics' Lien Act," upon the property in question, for the amount of the claim in that case. In the other case, there was no dissolution nor any change in the name or members of the firm.

Now the object of registration is to give notice of the existence and nature and amount of the claim, and of the

persons by and against whom it is claimed, and of the Judgment property subject to it, so that its nature and extent may Meredith, J. be known, and the persons making it dealt with by others interested in, or intending to acquire any interest in, the property ; and such information as answers the object of the Acts, should be held sufficient.

Looking then at the objects of the Acts, in aid of the persons doing the work or furnishing the materials, as well as the purpose of registration, and bearing in mind the rule of interpretation before mentioned, I am of opinion that the use of the partnership name in the claim of lien to be registered under section 16 of the "Mechanics' Lien Act," is a sufficient compliance with the requirements of the Act in that respect, [the section requires the name of the "claimant," not the "contractor" or "person," to be stated ;] and that it was not necessary that the individual names of the partners should, in either case, be given.

The debts were contracted with the firms, in the firms' names, and possibly the members of the firms were not all known, so that a statement of the individual names might, and in many cases would, give less information than a registration such as this. It was never intended that the benefits of the Acts should be frittered away by requiring the skill of a special pleader to secure them.

I think too, that the surviving partners might well register their claims in the name of the firm to which the debt was owed.

If instead of proceeding under section 16, the lien-holders had commenced their action, and registered a certificate under section 22, within thirty days from the 5th April,* could not that action, under the Con. Rules, have been brought in the firm name, and must not the certificate for registration have been in the same name ? Is it to be held that a registration, giving the partnership name, is, in the one instance, void, and, in the other, valid ?

Authority, so far as I have been able to find any bearing upon the question, is in favour of the plaintiff.

* This was the date when the last of the material for which the lien was claimed, was furnished.—R&P.

Judgment.
Meredith, J.

In *re Clough*, 31 Ch. D. 324, it was held that a surviving partner could give a valid charge on the property of the partnership, by deposit of title deeds, with a memorandum of such deposit, seemingly signed in the firm name, by way of security for a debt incurred by the firm in the lifetime of the deceased partner.

Bolckow v. Foster, 25 Gr. 476, and *Haig v. Gray*, 3 DeG. & S. 761, make it plain that, in equity as well as at law, before the Judicature Act, surviving partners might sue for the recovery of the partnership claims, and that the representative of a deceased partner was not a necessary party.

As to the power of surviving partners to give valid discharges of partnership debts, see *Brasier v. Hudson*, 9 Sim. 1; *Phillips v. Phillips*, 3 Ha. 281; Lindley on Partnership, 5th ed., 291 and 341. And as to continuance of partnership for the purpose of winding up its business, notwithstanding dissolution by death of a partner or otherwise, without any agreement to that effect, see Lindley on Partnership, 5th ed., p. 587-8.

A deed executed by one partner in the firm name with one seal only, may be the deed of all: *Moore v. Boyd*, 15 O. R. 513.

See also *The Pharmaceutical Society v. The London and Provincial Association (Limited)*, 5 App. Cas. 857.

In cases in the United States of America, the very points in question in this action seem to have been decided in favour of the plaintiffs' contentions: *Black's Appeal*, 2 Watts & Serg. 179; *Busfield v. Wheeler*, 14 Allen 139, referred to in the judgment in appeal. I refer also to *German Bank v. Schloth*, 59 Iowa, 516; *Jones v. Hurst*, 67 Mo. 568; and Bates on Partnership, secs. 267, note 7, 348 and 382.

As to the other questions, I incline to the view that this contestant cannot go behind the certificate issued by the Master under the 3rd section of the Act of 1890, 53 Vict. ch. 87, (O.), not having moved against it; that his proper course was to have attacked it.

But if not, although the papers filed, were not, in form, Judgment.
a compliance with the requirements of the Act, but were Meredith, J.
irregular, and although the certificate ought not to have
been issued out until they were brought in in proper form,
yet they do give substantially most of the information
which "a statement of claim" would contain; and it is, I
think, clearly a case in which an amendment should be
allowed. The practice is new. An officer of the Court
accepted them as sufficient, and issued his certificate. Can
it be fairly contended that leave to amend should now be
refused, and this lien thereby altogether defeated?

But it is said there is no power to amend proceedings
taken under the Act of 1890: 53 Vict. ch. 37, (O). I am
clearly of opinion, however, that that is not so. The
object of that Act was to simplify proceedings in actions to
enforce mechanics' liens. See sections 2, 4, 37 and 38. The
practical effect of the Act is, that there is what may, per-
haps, be termed a reference by statute to the proper
Master, in every case of this kind, without the delay and
expense of the ordinary proceedings of the Court upon
which a judgment of reference is made. The very title
of the Act is "to simplify the procedure." Yet we
are asked to so complicate it that any irregularity, or
false step, must prove fatal to the lien; irreparable,
unless there is time enough to begin anew. What was
it that the Act was intended to simplify and to remedy?
For one thing, the practice requiring the issue of a writ of
summons, pleadings, and motion for judgment, before a
reference to a Master, even in cases where there was no con-
test, and such proceedings were, therefore, mere matters of
form and expense. Under the Act all cases go directly to
the Master, and, for such of them as may present matter
proper for determination by a Judge, before the reference,
provision is made for sending them for such determination.

Viewed in this way the procedure under the Act is
plain; the lien-holder brings in his claim verified by
affidavit—no new thing in the practice in the Master's office;
the certificate is issued, and answers the double purpose of

Judgment. the certificate of *lis pendens* for registration, and of the
Meredith, J. warrant to consider and hear and determine. The Master has, and always had, ample power to allow or compel amendments of claims so brought in. In short the matter is before him, as upon any other reference, with the additional authority and power expressly conferred by the Act.

The Master therefore might, and I think should have, given leave to amend, and any necessary amendments should now be made.

It was also urged that the Con. Rules do not apply, because they are not expressly declared in the Act to be applicable. But there is no room for such a contention. The object and title of the Act is "to simplify *the procedure*," the then existing procedure. It is something engrafted upon—made part of—the existing practice of the Court. See section 37.

It was urged too, as to the first claim, that the action (see sections 4 and 38) should not have been brought in the partnership name. That Con. Rule 317, does not apply to a case where any one of the partners has died, and his interest in the claim has devolved upon his legal personal representative. But I do not think we need trouble ourselves with this question, for it, too, is a matter in which an amendment should be allowed.

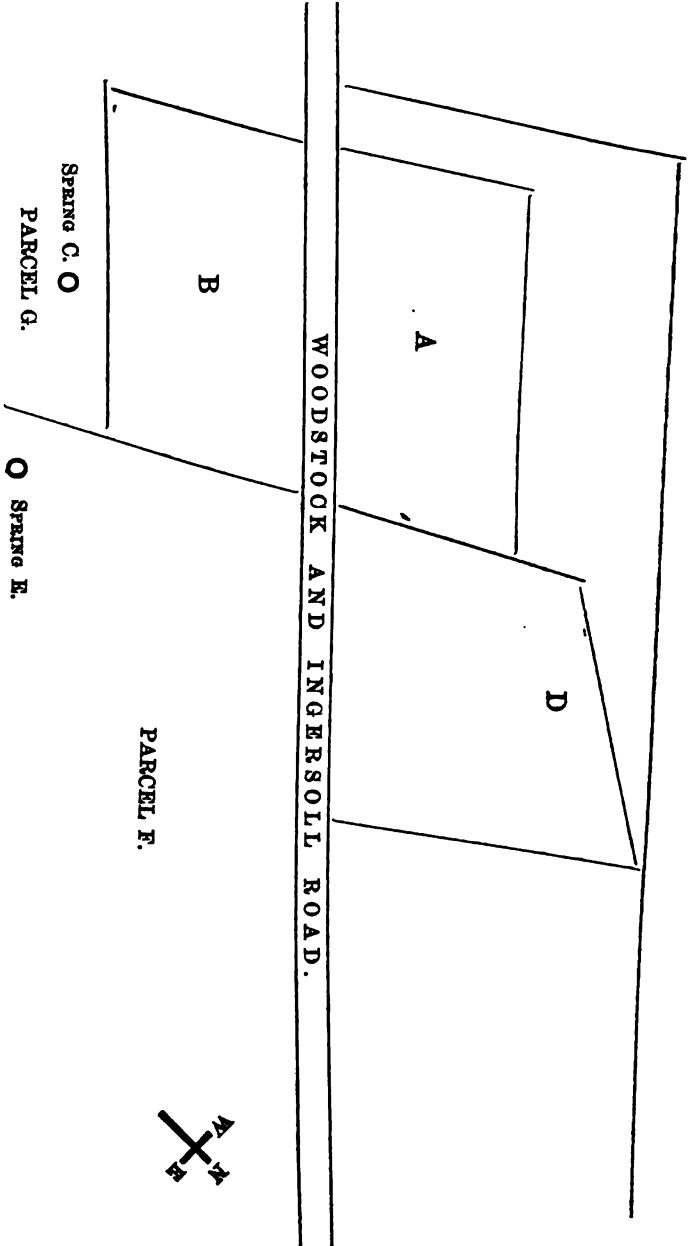
The plaintiffs should be permitted, if they desire to do so, to amend by adding the surviving partners, individually, as well as the legal personal representative of the deceased partner, as parties to the action. The contestant has not been misled; he has not been prejudiced in any way. No injustice is done to him by allowing the amendments, which, I have no doubt, should be allowed to meet the wholly unsubstantial objections with which this contestant has sought to defeat the objects of the Acts. Lindley on Partnership, 5th ed., pp. 277-8; Con. Rules 324, 441, 442, 444 and 445; and the notes to those rules in Holmsted and Langton's Judicature Act and Rules.

I would, therefore, dismiss this appeal, but would dismiss it without costs, for much of the difficulty has been no doubt, caused by the plaintiffs' irregularity and want of ordinary care in the institution of the proceedings; and also to mark my disapproval of the adding of claims *for the purpose of increasing costs*. There are no other lien-holders; the united claims amount to only \$202.52; and there is some question as to an item of \$2.10 included in that amount. I can imagine no good reason for the plaintiffs rejecting the summary procedure in the County and Division Courts, under sec. 28 of the "Mechanics' Lien Act," R. S. O. 1887, ch. 126, and adopting this much more expensive proceeding in the High Court.

Judgment.
Meredith, J.

Fully recognizing lien-holders' rights, under the statutes to join in one action, (one purpose of which was no doubt the saving of costs,) I cannot but think it quite as objectionable to add claims *for the purpose of increasing costs*, as to multiply actions for the same purpose.

A. H. F. L.



[QUEEN'S BENCH DIVISION.]

MCKAY V. BRUCE.

Easement—Grant of lands with right to use of springs on adjoining lands—Access to springs—Right to lay pipes to springs—Prescriptive rights—Enjoyment for twenty years—Interruption after twenty years—R. S. O. ch. 111, secs. 35, 37—Unoccupied lands—Owners absent—License—Revocation of—Possession—Extinguishing easement—Registry laws—Notice—Mortgagor and mortgagee.

The plaintiff claimed through the defendant's predecessor in title the right to use two springs, C and E, under conveyances in 1841 and 1843 of lands north of the springs. One conveyance granted the sole and perpetual right to spring C, together with the right to use a road from the southern boundary of the land granted, to the spring; the other granted the sole and perpetual use of and right to the water of spring E, without indicating the manner in which the water was to be approached or its enjoyment had. The defendant was the owner of the land to the south upon which the springs were situated. The water had been carried from the springs by means of pipes through the defendant's land to the plaintiff's land, from 1861 till 1882 or 1883, when the defendant tore up the pipes, insisting that the then owner of the plaintiff's land had no right to maintain them, and thereupon an arrangement was made under which the pipes were again put down with the addition of certain troughs for the convenience of the defendant's cattle :—

Held, that under the conveyances the plaintiff had a right of access to spring C by the road mentioned, and to spring E by a convenient road to be laid out, but had no right to the easement of conveying the water by pipes through the defendant's land.

The result of the interruption in 1882 or 1883 and the arrangement then made was that since that time the plaintiff must be taken to have maintained the pipes, not as a matter of right, but by the license of the defendant; under secs. 35 and 37 of the R. S. O. ch. 111, the fact that twenty years had expired before the interruption was immaterial; and therefore the plaintiff had not acquired a prescriptive right to the easement.

The fact that for nearly the first half of the period from 1861 to 1881 or 1883, the land over which the easement was claimed was unoccupied, and its owners out of the country, constituted another objection to the acquisition of a prescriptive right under sec. 35.

The license of the defendant under which the pipes were maintained since 1882 or 1883, being by parol, was determinable at any time by the defendant; and the defendant in subsequently taking up the pipes, which led to the bringing of this action, was acting within his strict legal right of revoking the license; and the plaintiff was not entitled to damages for their removal, or for disturbing the ground in which they lay whereby the water was rendered impure.

The possession by the defendant of the land through which access to the springs was to be had, for upwards of ten years, did not extinguish the plaintiff's right of access.

Mykel v. Doyle, 45 U. C. R. 65, followed.

Before the conveyances of 1841 and 1843, G., the then owner of all the lands now in question, conveyed them to M. by a deed absolute in form, but really intended as a mortgage, and in 1857, in a redemption suit brought by persons who had acquired the equity of redemption from

G., after the registration of the conveyances of 1841 and 1843, it was declared that this conveyance was a mortgage only, and in 1858 a conveyance was made by the representatives of G., pursuant to the decree, reciting the payment of the mortgage moneys and conveying the lands to the plaintiffs in the redemption suit. The defendant claimed the land upon which the springs were situated under the grantees in the conveyance of 1858 :—

Held, that the defendant was affected under the Registry Acts with notice that M. was a mortgagee only, and that those who redeemed him did so as owners of the equity; and the defendant could not set up the estate of the mortgagee, which, upon payment of the mortgage, was a bare legal estate, carrying with it no rights as against the beneficial owners of the land.

Statement.

THE plaintiff in this action asserted that he was entitled by grant and also by prescription to the use of two springs of water issuing upon lands in the gore of the township of West Oxford, lying upon the south side of the Woodstock and Ingersoll road, and that the defendant had torn up certain pipes connecting the two springs and had fouled the water and cut off the springs, altogether, from their connection with the plaintiff's means of using them. The defendant denied the plaintiff's right to the springs, and the right to use them as they had been used by the plaintiff, denied any wrongful acts, and claimed a right in himself to the land upon which the acts complained of were committed, and the springs which were interfered with.

The plaintiff at the trial claimed title to the parcels marked A and B and to the spring marked C upon the accompanying sketch, under a conveyance dated 1st March, 1841, from F. J. S. Groves and wife to W. C. Macleod, in fee. In this conveyance, after describing by metes and bounds the two parcels of land A and B, the following words followed: "Together with the sole and perpetual right to a spring rising southerly from the southerly boundary of the last described acre (parcel B) the centre of which spring is situated at a point where a line bearing S. 23° 47' E. from the S. E. angle of the first described acre (parcel A), is intersected by a line bearing from the S. W. angle of the same acre N. 80° 25' E. Together also with the right to use a road forty feet in breadth from a point on the said southern boundary at the distance of 1 ch. 22 lks. from the S. E. angle of the said acre to the said spring."

The plaintiff also claimed title to the parcel D and to the ^{Statement.} spring E under a conveyance dated 30th October, 1843, from the same F. J. S. Groves and wife to William Grey, in fee. In this conveyance, after describing by metes and bounds the parcel D, the following words followed: "Together with the sole and perpetual use of and right to the water of a spring rising southerly from the said tract of land herein described, the centre of which spring bears, etc., etc.," fixing by converging lines the locality of spring E, which was not disputed.

The plaintiff claimed title through the respective grantees in these two conveyances, by various mesne transfers, which were put in. He also gave evidence that for upwards of twenty years before this action was begun he and his predecessors in title had conveyed the water from the spring E to the spring C by means of hollow logs, and that from spring C the waters of both springs had been conducted through pipes to certain factories upon parcels A and B, on which manufactures of various kinds had been from time to time carried on.

The defendant was the owner of parcels F and G, upon which springs C and E were situated, and the trespasses complained of were that he had fouled the water of the springs by allowing his cattle to drink in them, and that he had torn up the pipe-logs connecting the two springs, and also the pipes leading from spring C to the boundary between parcels B and G. It appeared that the actual flow of the water from the spring C was towards the parcel B, and that the actual flow of the water from spring E was along a small gully or ravine along the west boundary of parcel F to the road.

Some six or seven years before action the defendant had torn up the pipes connecting the springs with parcel B, because, after having been so arranged for a number of years as to allow of his cattle drinking water from the springs, one Clarke, who then owned parcels A, B, and D, had made a new arrangement of the means of conducting the water, which shut off the defendant's cattle altogether

Statement. from the water. This interruption was done by the defendant at that time as a matter of right; a verbal arrangement was then made by which the pipes were renewed, but certain troughs were made and connected with the springs, so that a portion of the water from the springs ran into the troughs, and the defendant's cattle drank from them without interfering with the purity of the water which reached the works on parcels A and B. The plaintiff acquired parcels A, B, and D, and a transfer of his right to the springs from Clarke, whilst this arrangement was being acted upon, but disagreements arose. The defendant complained that the plaintiff would not keep up his portion of the line fence between them, and that in consequence of this his cattle got into the plaintiff's land, where they were ill-treated by the plaintiff's men. Being annoyed at this, he tore up the pipe-logs as far as his own land extended, that is, to the southerly boundary of parcel B, and the result was that the water from the springs reached the plaintiff's works in a muddy and impure state.

The trial took place at Woodstock, on 2nd November, 1888, before FALCONBRIDGE, J., without a jury. The judgment was stayed until 16th May, 1890, pending an attempted settlement between the parties. Thereupon the learned trial Judge gave judgment for the plaintiff, and assessed the damages at \$150, adding a declaration, by consent of the parties, of the defendant's right to water his cattle at the springs in question, using proper appliances to prevent the fouling of the water.

Notice of motion was given by the defendant to set aside this judgment at the Michaelmas Sittings of the Divisional Court in 1890. The motion was enlarged at counsels' request until the Hilary Sittings, 1891, at which, on 10th February, it was argued before the Divisional Court, (ARMOUR, C. J., and STREET, J.)

C. J. Holman, for the defendant, referred to *Wood v. Argument. Saunders*, L. R. 10 Ch. 582; *Collins v. Slade*, 23 W. R. 199; *Gale on Easements*, 6th ed., pp. 8, 11, 12, 523; *Race v. Ward*, 4 E. & B. 702; *Goddard on Easements*, 3rd ed., p. 8; *Heward v. Jackson*, 21 Gr. 263; *Wimbledon v. Dixon*, 1 Ch. D. 362, at p. 374; R. S. O. ch. 111, sec. 35; *Eaton v. Swansea*, 17 Q. B. 267.

Aylesworth, Q. C., for the plaintiff, referred to *United Land Co. v. Great Eastern R. W. Co.*, L. R. 17 Eq. 158; L. R. 10 Ch. 586; *Newcomen v. Coulson*, 5 Ch. D. 133; *Finch v. Great Western R. W. Co.*, 5 Ex. D. 254.

Holman, in reply, referred to *Leith's Bl.*, 2nd ed., p. 60.

March 6, 1891. The judgment of the Court was delivered by

STREET, J. :—

Three questions arise upon this motion :—

First. Had the defendant a right to tear up the pipes through his own land by means of which the plaintiff was in the habit of conveying the water from the springs to his factories?

Second. Is the defendant liable to pay the damages sustained by the plaintiff owing to his having, by tearing up these pipes, caused the fouling of the water which found its way to the plaintiff's factory?

Third. Is the plaintiff entitled to an injunction to restrain the defendant from interfering with the springs in question?

The first and second of these questions do not involve any consideration of the paper title under which the plaintiff claims the right to the use of the water from the springs, because the enjoyment which he claims is plainly not the enjoyment given by the grants from Groves in 1841 and 1843 respectively.

The grant from Groves to McLeod in 1841 conveys the parcels A and B, and grants the sole and perpetual right

Judgment. to a spring, together with the right to use a road, forty feet
Street, J. wide, from the southerly boundary of parcel B to the spring C granted by this conveyance. The plain construction of the grant of the right to the waters of the spring, along with a right of way to it, is that the grantee and his heirs were to use the road for the ordinary purposes of a road in connection with the spring, not to use it for purposes other than those for which a road is understood to be used: see *Jamaica Pond Corporation v. Chandler*, 9 Allen 159. And the grant of a right to a road in connection with the spring expressly excludes any supposition, which might otherwise have arisen from the manner in which the water has been used, that it was intended that the spring should be enjoyed by means of pipes laid from it. So that in conveying the water from spring C to parcels A and B, by means of pipes over parcel G, the plaintiff was doing something upon the defendant's land which was certainly not justified by the grant.

In the same way, in conveying water by means of pipes from spring E to spring C, the plaintiff was doing that for which no authority is to be found in the grant of 1843, from Groves to Grey, which is a grant of parcel D, "together with the sole and perpetual use of and right to the water of a spring," describing spring E, but not indicating the manner in which the water was to be approached or its enjoyment had. The construction of this would, no doubt, give to the grantee and his heirs a right to use the water by a convenient road or access from the highway opposite parcel D, with which the spring was granted, to the spring itself. It certainly could not have been construed as giving any implied right to carry it to spring C, or through parcel G, or to carry it anywhere by a permanent aqueduct above or beneath the soil.

Being excluded then by the terms of these grants from a right to rely upon them as a support to his claim to the easement of conveying the water from the springs, by pipes, through the defendant's land, the plaintiff claims a prescriptive right to do so; and there appears to be no

doubt that from a period at least as far back as November, 1861, the water has been carried from the springs, through the defendant's land, in this way. It also appears, however, to be equally clear that in 1882 or 1883 the defendant, upon some new arrangement of the pipes being made by Clarke, who then owned parcels A, B, and D, the result of which was to deprive the defendant's cattle of the water they had been drinking from the springs, tore up the pipes and insisted that Clarke had no right to maintain them, and that thereupon the sensible arrangement was made that Clarke might put down the pipes again, with the addition of certain troughs out of which the defendant's cattle might drink without fouling the water which reached the factory, and matters so remained until after the plaintiff bought from Clarke and until the disputes arose which led to this action. The result of the interruption in 1882 or 1883 by the defendant, and the arrangement then made, seems to be that since that date the plaintiff must be taken to have maintained these pipes, not as a matter of right, but by the license of the defendant then given : in other words, the interruption which then occurred was acquiesced in for considerably more than the year which is required by sec. 37 of ch. 111, R.S.O., to constitute an interruption within the terms of that section; and as that section, taken in connection with sec. 35, only gives a party a right to an easement which has been enjoyed without interruption and under a claim of right for the full period of twenty years next before the action in which it is claimed, the mere fact that that period had expired before the interruption took place is immaterial. Another objection to the prescriptive right claimed by the plaintiff is to be found in the fact that for nearly the first half of the period down to 1882 or 1883, during which it is claimed to have been exercised, the land over which the right is claimed was unoccupied or in a state of nature, and its owners were out of the country.

The section under which the plaintiff claims a prescriptive right is section 35 of ch. 111, which provides that

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such a claim is liable to be defeated in any way in which it was liable to be defeated at the time the Act was passed, excepting by shewing a commencement of the right.

In *Daniel v. North*, 11 East 372, Lord Ellenborough says: "The foundation of presuming a grant against any party is, that the exercise of the adverse right on which such presumption is founded was against the party capable of making the grant: and that cannot be presumed against him unless there were some probable means of his knowing what was done against him." This was in 1809, before the Prescription Act was passed in England.

In *Bright v. Walker*, 1 C. M. & R. 211, Parke, B., in considering the English Act which had just come into force, says that under the section corresponding with our section 35, the right claimed is liable to be defeated by shewing "the absence or ignorance of the parties interested in opposing the claim, and their agents during the whole time that it was exercised." See also *Tickle v. Brown*, 4 A. & E. at p. 382.

The claim to the prescriptive right appears, therefore, to fail, and the pipes, since 1882 or 1883, have been maintained upon the defendant's land by virtue of a license to Thomas J. Clarke. That license, being by parol, was determinable at any time by the defendant: *Hewlins v. Shippam*, 5 B. & C. 221; *Fentiman v. Smith*, 4 East 107; *Wood v. Leadbitter*, 13 M. & W. 838. It was personal to the licensee, Clarke, in the first place, and was not assignable by him to the plaintiff, but there is evidence from which a renewal to the plaintiff may be inferred: *Roffey v. Henderson*, 17 Q. B. 574. But whether such renewal is or is not to be inferred, I am of opinion that the plaintiff is not entitled to recover damages, either because of the removal of the pipe-logs or because the defendant in removing them disturbed the ground in which they lay and thus made the water which reached the plaintiff's factory muddy and impure. The defendant in taking the pipes up was acting within his strict legal right of revoking the license.

The third question is whether the plaintiff, although not entitled to damages, is entitled to an injunction to restrain the defendant from interfering with the plaintiff's right to use the water from the springs by means of the pipes in question? This right is asserted by the plaintiff and denied by the defendant upon the pleadings, and it involves the consideration of the paper title under which the plaintiff claims the right to the use of the springs, and to exclude the defendant from using them.

Judgment.
Street, J.

The grants from Groves, above referred to, of the rights in question are, in each case, of the sole and perpetual right to the waters of the spring, and the user, although not always to the full extent of the right granted, has been sufficient to prevent the easement from having become extinguished.

The defendant contended that his possession of the land through which the ways to the springs must go, for upwards of ten years, had extinguished the plaintiff's right of access to them; but in *Mykel v. Doyle*, 45 U. C. R. 65, the majority of the Court held that easements of this nature are not affected by the clauses in the Limitation Act upon which the defendant here relies, and this decision has not been questioned in any later case. The plaintiff then would be entitled still to the road granted, along with the spring C in the grant of 1841, and to the way of necessity which must be taken to have been granted with the spring E.

The objection to the plaintiff's title set up in the statement of defence and urged upon us in argument was that F. J. S. Groves was not at the time he made the grants relied on by the plaintiff, in 1841 and 1843, the owner of the lands upon which the springs are situated.

It appears that in 1840 Groves, being owner in fee of all the parcels of land in question, as well as of the land surrounding them north and south of the road, containing in all some 200 acres, conveyed the same, by deed absolute in form, but really intended as a mortgage, to General Murray. Shortly afterwards and in the same year General Murray reconveyed to Groves five acres of the land con-

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Street, J.

veyed, which is said to include parcels A, B, and D, and perhaps also the spring C, but certainly not the spring E.

In 1857, in a redemption suit brought by Archibald Kerr and others, who had acquired the equity of redemption from Groves in the mortgaged premises, against the executrix and executor of General Murray, it was declared that the conveyance of 1840 was a mortgage only and that the plaintiffs in that suit were entitled to redeem. Then, by a conveyance dated 24th June, 1858, from the executrix and executor of Murray to Kerr and others, the plaintiffs in the redemption suit, after reciting the conveyance of 1840, the decree, and the fact that Kerr and others had paid the mortgage money, etc., the grantors conveyed to the grantees the whole of the lands originally conveyed by Groves to Murray without excepting any part. The defendant claims the land upon which the springs are situated, by various mesne conveyances, under the grantees in the deed of 24th of June, 1858, and asserts that his title, being derived from General Murray, whose title was prior to that under which the plaintiff claims the springs, is paramount.

The defendant, however, is clearly affected under the Registry Acts with notice that General Murray was a mortgagee only, and that Kerr & Co., who redeemed him, did so in the character of owners of the equity of redemption. Their purchase of the equity of redemption from Groves was many years after the registration of the grants from Groves of these springs, and they could no more set up the legal estate acquired from General Murray's representatives, as against the grantees of the springs, than Groves himself could have done. The defendant is in the same position, and cannot set up the estate of the mortgagee, which, upon the payment of the mortgage by Kerr & Co., was a bare legal estate, carrying with it no rights as against the beneficial owners of the land.

A clerical error, in one of the conveyances under which the plaintiff claims, in the description of spring C, was mentioned as an objection to his title, but the objection was not pressed and was clearly untenable.

Judgment.
Street, J.

The injunction for which the plaintiff asks, viz, to restrain the defendant from interfering with his user by means of the pipes of the water, and from fouling it by tearing up the pipes, etc., is clearly far beyond his rights, and the claim to the untenable right of conveying the water through the defendant's land by means of pipes appears to have been the real matter in dispute.

The plaintiff, therefore, fails upon all the real matters in dispute, and must pay the costs of the action and of the motion; the judgment will declare the plaintiff and the owners for the time being of parcels A and B entitled to the sole and perpetual right to the spring C, and to the right of access thereto, from the southerly boundary of parcel B, by means of the road forty feet wide, described in the grant of 1841; and the plaintiff and the owners for the time being of parcel D entitled to the sole and perpetual use of and right to the water of the spring E, together with a right of access thereto from the highway by a sufficient road to be laid out for the purpose by the deputy-registrar at Woodstock, if the parties differ about its position and extent.

The parties have succeeded in establishing, by this long and expensive litigation, that the defendant is not entitled to use any of the water of these springs for any purpose, and that his land is to be burdened by rights of way to them; and that the plaintiff, though entitled to the water for his sole and perpetual use, is debarred from making use of it in a way likely to be of any service to him.

[QUEEN'S BENCH DIVISION.]

MARTINSON V. PATTERSON.

Chattel mortgage—Foreign contract as to chattels in Ontario—R. S. O. ch. 125—Chattel mortgages not complying with—Effect of taking possession—Full amount of consideration not advanced—Falsity of affidavit of bona fides—Priorities between mortgages—Subsequent mortgagee in good faith—Notice.

Held, following *River Stave Co. v. Sill*, 12 O. R. 557, that goods which were in Ontario at the time of the execution of a document of hypothecation of them were subject to the provisions of R. S. O. ch. 125, although the parties thereto were at the time domiciled in a foreign country.

Held, also, that the plaintiff could not under his prior chattel mortgage, by taking possession of the mortgaged chattels, after the execution and filing of a subsequent chattel mortgage to the defendant, although before the time at which the defendant could have taken possession, hold the mortgaged goods against the defendant, where the plaintiff's mortgage did not comply with the Act, if the defendant's mortgage had complied therewith.

Judgment of STREET, J., 20 O. R. 125, affirmed on these points.

But where the amount of the consideration for the defendant's mortgage was less than the amount expressed therein and sworn to by the defendant in his affidavit of *bona fides* as the true amount:—

Held, that the defendant's mortgage did not comply with the Act, and the plaintiff, by reason of taking possession as before mentioned, could hold the goods against the defendant.

Robinson v. Paterson, 18 U. C. R. 55, followed.

Hamilton v. Harrison, 46 U. C. R. 127, not followed.

Judgment of STREET, J., reversed on this point.

Held, also, that the "subsequent purchasers or mortgagees" referred to in sec. 4 of R. S. O. ch. 125, are those whose purchases or mortgages are accompanied by an immediate delivery and followed by an actual and continued change of possession, or who have complied with the provisions of the Act; and as neither the plaintiff nor the defendant came within the words, the plaintiff, being prior in point of time, had priority; but if the defendant could be treated as a subsequent mortgagee, he was not a subsequent mortgagee in good faith, by reason of the falsity of his mortgage.

Held, lastly, doubting, but following *Moffatt v. Coulson*, 19 U. C. R. 341, that notice of the plaintiff's mortgage when he took his own was not a reason for depriving the defendant of the status of a subsequent mortgagee in good faith.

Statement. THE facts relating to this action are stated in the report of the case, ante p. 125.

The action was one of replevin, brought by a first mortgagee of certain chattels against the personal representative of a second mortgagee. The first mortgage was admittedly defective; but the plaintiff, the first mortgagee, had taken

possession of the chattels under his mortgage before default ^{Statement.} in the second mortgage, and the full amount of the consideration stated in the second mortgage had not been advanced upon it.

The judgment of the trial Judge, STREET, J., was in favour of the defendant. See ante, p. 128.

At the Hilary Sittings of the Divisional Court, 1891, the plaintiff moved to set aside the judgment of STREET, J., and to enter judgment for the plaintiff on the following among other grounds: (1) That the said judgment was contrary to law and the evidence and the weight of evidence. (2) That the parties to the document put in at the trial by the plaintiff dated the 8th day of October, 1888, being domiciled in the State of Michigan at the time of the execution of the same, and it having been proved that by the law of Michigan the document in question, under the circumstances disclosed in evidence, operated to transfer the title in the goods in question herein to the plaintiff, the judgment ought to have been for the plaintiff, independently of any question arising upon the subsequent chattel mortgage of the 24th December, 1888. (3) Even if the chattel mortgage in question constituted the only title upon which the plaintiff could rely, and even if the same was invalid originally as against creditors and subsequent mortgagees, yet, before any right in the defendant or her intestate to take possession of the goods, as subsequent mortgagee, had accrued, the plaintiff had made the mortgage in question valid as against the defendant and her intestate by taking possession of the goods in question. (4) The defendant's intestate was not a subsequent mortgagee in good faith for valuable consideration within the meaning of the Chattel Mortgage Act and upon the evidence.

On the 2nd February, 1891, the motion was argued before ARMOUR, C. J., and FALCONBRIDGE, J.

Argument.

Shepley, Q. C., for the plaintiff. I do not give up the point that the original contract between the plaintiff and the mortgagor was governed by the foreign law, but *River Stave Co. v. Sill*, 12 O. R. 557, is against me in this Court. Section 4 of the Chattel Mortgages and Sales Act, R. S. O. ch. 125, makes no distinction between creditors and subsequent purchasers or mortgagees. If the rights of creditors are cut down by the decisions, where possession has been taken under a defective mortgage, so are the rights of subsequent purchasers and mortgagees. The second mortgage, the defendant's, is not what section 4 requires it to be, a subsequent mortgage in good faith and for valuable consideration. Even if the second mortgage complied with the statute, the mortgagee therein would take with knowledge of the plaintiff's prior rights, and would be affected thereby. *Tidey v. Craib*, 4 O. R. 696, is really not against me on this point. I refer also to *Moffatt v. Coulson*, 19 U. C. R. 341; *Farmers' L. & T. Co. v. Hendrickson*, 25 Barb. 484, 486; *Tiffany v. Warren*, 37 Barb. 571; *Sayre v. Hewes*, 32 N. J. Eq. 652; Barron on Bills of Sale, 2nd ed., pp. 365, 367; *Hodgins v. Johnston*, 5 A. R. 449. The affidavit of *bona fides* in the second mortgage is untrue; there is an untrue statement of the consideration, and that invalidates it.

Masson, Q. C., for the defendant. It is necessary only that there should be good faith between the parties to the mortgage and the doctrine of notice does not apply. The second mortgagee, hearing of the first mortgage, made inquiry and was informed nothing was due upon it. If both mortgages are bad, the second has the preference. I refer to Barron, p. 367; *Frank v. Miner*, 50 Ill. 444. The erroneous statement of the consideration did not avoid the mortgage: *Hamilton v. Harrison*, 46 U. C. R. 127. As soon as the second mortgage was executed the lien of the mortgagee therein attached on the goods: *Keller v. Paine*, 107 N. Y. 83, 89.

Shepley, in reply, referred to Barron, p. 364; *Tyler v. Strange*, 21 Barb. 198, 205.

March 6, 1891. The judgment of the Court was Judgment
delivered by Armour, C.J.

ARMOUR, C. J.:—

The goods in question in this suit were at the time of the execution of the document of the 8th day of October, 1888, in the Province of Ontario, and were subject to the provisions of the Act respecting Mortgages and Sales of Personal Property, R. S. O. ch. 125, although the parties thereto were at that time domiciled in the State of Michigan: *River Stave Co. v. Sill*, 12 O.R. 557; *Keller v. Paine*, 107 N. Y. 83.

The plaintiff's chattel mortgage did not comply with the provisions of the said Act, and if the defendant's chattel mortgage had complied with such provisions, and the mortgagee therein had been within that Act, I am of opinion that the plaintiff could not, by taking possession of the goods mortgaged to him, after the execution and filing of the defendant's chattel mortgage, although before the time at which, by the terms of the defendant's chattel mortgage, the mortgagee therein could have taken possession of the goods therein mentioned, hold the mortgaged goods against the defendant.

But it is contended that the defendant's chattel mortgage did not comply with the Act, and that the mortgagee therein was not within the Act, and that by reason thereof the plaintiff, by taking possession of the goods mortgaged to him even after the execution and filing of the defendant's mortgage, was entitled to and could hold them against the defendant.

The defendant's chattel mortgage was made for the expressed consideration of two thousand and five hundred dollars, and the affidavit of the mortgagee filed therewith was that the mortgagor "in the foregoing bill of sale by way of mortgage named is justly and truly indebted to me, this deponent, John Patterson, the mortgagee therein named, in the sum of two thousand five hundred dollars

Judgment. mentioned therein; that the said bill of sale by way of Armour, C.J. mortgage was executed in good faith and for the express purpose of securing the payment of the money so justly due or accruing due as aforesaid, etc."

It is difficult to ascertain from the evidence what was the true amount of the consideration for the defendant's mortgage, but it is quite certain that it was not the amount of the consideration expressed therein and sworn to by the mortgagee, but a much less amount, and this being so, I am of the opinion that the defendant's mortgage cannot be said to comply with the Act, and that the mortgagee therein cannot be said to be within the Act.

The Act plainly requires, if not by express words, certainly by necessary implication, that the true consideration shall be stated in the mortgage, and, in order to ensure the true consideration being stated in the mortgage, it requires that the mortgagee shall swear in effect that it is truly stated therein.

Such affidavit shall state that the mortgagor therein named "is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage." What does this mean, unless it means that the sum which the mortgage is taken to secure shall be truly stated in the mortgage? It surely cannot mean that the sum may be untruly stated in the mortgage, and that the affidavit of the mortgagee may be false, and yet that the mortgage shall be held to comply with the Act.

It will, I presume, be conceded that a chattel mortgage without any affidavit by the mortgagee would not comply with the Act. How then can a chattel mortgage with a false affidavit by the mortgagee be said to comply with the Act? What warrant can there be for our reading the Act as if it provided that such affidavit shall state, whether truly or falsely it matters not, that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage; and what warrant can there be for holding that when the Legislature used the word "affidavit," they intended it to mean a false affidavit?

To hold that a chattel mortgage with the sum which it was taken to secure untruly stated therein, and with a false affidavit by the mortgagee, complied with the Act, would be simply a judicial invitation to fraud and false swearing. Judgment.
Armour, C.J.

The first Bills of Sale Act in England, 17 & 18 Vict. ch. 36, did not require the consideration to be stated in the bill of sale, nor was there any mention of consideration in that Act, and under it was determined the case of *Biddulph v. Gould*, 11 W. R. 882, which is sometimes cited in support of the contrary to the opinion I am now upholding, but it obviously does not affect the question.

The Bills of Sale Act in England 41 & 42 Vict. ch. 31, sec. 8, provided, however, that "every bill of sale to which this Act applies shall set forth the consideration for which such bill of sale was given;" and under this provision the Courts there uniformly held that "consideration" meant "true consideration": *Ex parte Charing Cross Advance and Deposit Bank—In re Parker*, 16 Ch. D. 35; *Hamilton v. Chainé*, 7 Q. B. D. 1; *Richardson v. Harris*, 22 Q. B. D. 268.

The Bills of Sale Act in England 45 & 46 Vict. ch. 43, sec. 8, provided also that "every bill of sale shall truly set forth the consideration for which it was given," and it was held that the addition of the word "truly" did not add to the sense, for where the Act 41 & 42 Vict. ch. 31 said "shall set forth," it must have meant "shall set forth truly:" *Staniforth v. Capon*, 2 Times L. R. 493. The Bills of Sale Acts in England 17 & 18 Vict. ch. 36 and 41 & 42 Vict. ch. 31 required that an affidavit should be filed with the bill of sale of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, and of every attesting witness to such bill of sale; and the Courts in England invariably held that a bill of sale did not comply with these Acts when the affidavit was false in fact.

In *Brodrick v. Scalé*, L. R. 6 C. P. 98, Willes, J., said at p. 103: "It has been established in so many cases that

Judgment. the description required by the Act is a 'true' description, that it would be waste of time to refer to any authority for that proposition." See also *Allen v. Thompson*, 1 H. & N. 15; *Tuton v. Sanoner*, 3 H. & N. 280; *Beales v. Tennant*, 29 L. J. Q. B. 188; *Adams v. Graham*, 33 L. J. Q. B. 71; *Ex parte Hooman—In re Vining*, L. R. 10 Eq. 63; *Larchin v. North Western Deposit Bank*, L. R. 10 Ex. 64; *Castle v. Downton*, 5 C. P. D. 56; *Ex parte Webster—In re Morris*, 22 Ch. D. 136; *Matthews v. Buchaman*, 5 Times L. R. 373.

The object of the Imperial Legislature in passing these Acts and the object of our Legislature in passing our Act was the same, and the results from compliance with these Acts were, as thereby declared, the same as the results declared by our Act to flow from non-compliance with it, namely, the avoidance of the conveyance.

The principle, therefore, of these decisions of the English Courts upon the construction of the English Bills of Sale Act is entirely applicable to the construction of our Act, and so applying it, the defendant's chattel mortgage, by reason of the untrue statement therein of the sum which it was taken to secure, and by reason of the false affidavit, does not comply with the Act.

If it was necessary to a compliance with the English Acts that the affidavit thereby required should be true, it is equally necessary to a compliance with our Act that the affidavit thereby required should be true.

What was said by Williams, J., as to the construction of the Imperial Act 17 & 18 Vict. ch. 36, in *L. and W. Loan Co. v. Chase*, 12 C. B. N. S. 730, 739, and approved of in several subsequent cases, is equally applicable to the construction of our Act: "The legislature have * * imposed certain conditions, upon the performance of which alone bills of sale are to be valid; and I think we have no right to lighten the fetters which the legislature in their wisdom have thought it right to place upon these transactions, by reason of any supposed hardship or difficulty in complying with the conditions."

In *Robinson v. Paterson*, 18 U. C. R. 55, this Court ^{Judgment.} unanimously held that a chattel mortgage such as the ^{Armour, C.J.} defendant's chattel mortgage did not comply with the Act.

In *Hamilton v. Harrison*, 46 U. C. R. 127, a majority of this Court declined to follow *Robinson v. Paterson* in a similar case.

In *Parkes v. St. George*, 2 O. R. 342, Boyd, C., followed *Robinson v. Paterson*, but in the same case, in 10 A. R. 496, the Court of Appeal was equally divided.

In *Ross v. Dunn*, 16 A. R. 552, the point was not decided, but there were in that case indications that the opinion was gaining ground that a false statement in a chattel mortgage of the sum secured thereby, supported by a false affidavit, is a true compliance with the Act.

I am quite unable to understand how a transaction so evidenced can be said, either in law or morals, to be an honest transaction; or how such a chattel mortgage can be said to be executed in good faith.

The decisions in this Court being diverse, and there being no decision of an appellate Court on the point, I retain the opinion expressed by me in *Hamilton v. Harrison*.

Neither the plaintiff's chattel mortgage nor the defendant's complying with the Act, and the plaintiff having taken possession of the mortgaged property under his mortgage, he was, in my opinion, entitled to hold it against the mortgagee in the defendant's mortgage, and the mortgagee in the defendant's mortgage having taken it out of the plaintiff's possession, he is entitled to recover it from the mortgagee in the defendant's mortgage.

It was contended that, the plaintiff's chattel mortgage being void as against subsequent purchasers or mortgagees in good faith for valuable consideration, the mortgagee in the defendant's mortgage, although his mortgage did not comply with the Act, was nevertheless a subsequent mortgagee in good faith for valuable consideration, and so was entitled to the mortgaged property as against the plaintiff.

Judgment. I am of the opinion, however, that the "subsequent purchasers or mortgagees" referred to in the Act must be taken to mean subsequent purchasers whose purchases are accompanied by an immediate delivery, and followed by an actual and continued change of possession of the goods purchased, or subsequent purchasers who have complied with the provisions of the Act; and subsequent mortgagees whose mortgages are accompanied by an immediate delivery and an actual and continued change of possession of the goods mortgaged, or subsequent mortgagees who have complied with the provisions of the Act.

Neither the plaintiff's mortgage nor the defendant's mortgage was accompanied by an immediate delivery and an actual and continued change of possession of the goods mortgaged, and neither complied with the provisions of the Act.

The provisions of the Act cannot, therefore, be invoked by one against the other, but they must both stand, as between each other, unaffected by such provisions, and as they would stand at common law, the one prior in point of time having priority over the other.

If, however, the mortgagee in the defendant's mortgage must be treated as a subsequent mortgagee within the meaning of the Act, I do not think that he could be held to be a subsequent mortgagee in good faith, by reason of the falsity of his mortgage.

It appeared that at the time the mortgagee in the defendant's mortgage took his mortgage he was aware that the plaintiff had a mortgage upon the property comprised in it and that he took a writing from the mortgagors guaranteeing that all claims against the goods and chattels contained therein had been satisfied previous thereto.

And it was contended that, under these circumstances, the mortgagee in the defendant's mortgage could not be held to be a subsequent purchaser in good faith, and there is a great deal to be said for this view, but we are bound to hold otherwise by the decision in this Court of *Moffatt v. Coulson*, 19 U. C. R. 341.

It was stated at the trial that it could be shewn that Judgment. there was nothing due upon the plaintiff's mortgage at Armour, C.J. the time of the taking of the defendant's mortgage, but the learned Judge declined to go into the accounts to ascertain how this was.

The defendant may, therefore, if she so elects within one month, have a reference to ascertain what, if anything, was due to the plaintiff in respect of any securities held by him upon the property mortgaged by the defendant's mortgage at the time such mortgage was taken, and thereafter until the time when the mortgagee in the defendant's mortgage took the property thereby mortgaged out of the possession of the plaintiff. If she so elects, further directions and costs will be reserved; if she fails so to elect, there will be judgment for the plaintiff with costs.

I refer to *Farmers' L. & T. Co. v. Hendrickson*, 25 Barb. 484; *Tiffany v. Warren*, 37 Barb. 571; *Frank v. Miner*, 50 Ill. 444; *De Courcey v. Collins*, 21 N. J. Eq. 357; *Sayre v. Hewes*, 32 N. J. Eq. 652; *Gooding v. Riley*, 50 N. H. 400; *Tatam v. Haslar*, 23 Q. B. D. 345; *Jones v. Gordon*, 2 App. Cas. 616; *Vane v. Vane*, L. R. 8 Ch. 383; *Butcher v. Stead*, L. R. 7 H. L. 849; *Lucas v. Dicker*, 5 C. P. D. 150; *Lucas v. Dicker*, 6 Q. B. D. 84.

END OF VOL. XX.

A DIGEST
OF
ALL THE CASES REPORTED IN THIS VOLUME
BEING DECISIONS IN THE
QUEEN'S BENCH, COMMON PLEAS, AND CHANCERY
DIVISIONS
OF THE
HIGH COURT OF JUSTICE FOR ONTARIO.

**ACTION FOR FALSE ARREST
AND IMPRISONMENT.**

Action against magistrate—Wrongful act of constable—Conviction not quashed.

See CANADA TEMPERANCE ACT, 1.

ARBITRATION AND AWARD.

Motion to set aside—Lapse of time—52 Vict. ch. 13 (O.), secs. 2, 3, 4, 6.]—A motion to set aside an award under a reference by consent was made within fourteen days of the filing, but more than four months after the making thereof:—

Held, too late. Baldwin v. Walsh, 511.

ASSIGNMENT FOR CREDITORS.

Guarantor—Right to rank—Right to dividend.

*See GUARANTEE, 1.
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ASSIGNMENTS AND PREFERENCES.

1. *Assignment for benefit of creditors—Priority over executions—Purchase money of land sold under mortgage—R. S. O. ch. 124, sec. 9.]—Where, after a sale of mortgaged premises in an action for that purpose, the mortgagor made an assignment for the benefit of his creditors under R. S. O. ch. 124, before certain prior execution creditors had established their claims in the Master's Office to the balance of purchase money, after satisfying the amount of the mortgage:—*

Held, that the assignee for creditors was entitled to such balance freed from any liability to satisfy the executions out of it. Carter v. Stone, et al., 340.

ATTACHMENT OF DEBTS.

Money handed by prisoner to constable after arrest.

See PROHIBITION, 3.

BANKS AND BANKING.

1. *Discount of promissory notes—Right of bank to recover accessory securities.*—A tradesman sold goods to customers taking promissory notes for the price and also hire receipts by which the property remained in him till full payment was made. The notes were discounted through the medium of a third person by the plaintiffs, who were made aware when the line of discount was opened of the course of dealing, and of the securities held. They were not however, put in actual possession of the securities, and there was no express contract in regard to them.

In an action to recover the securities, or their proceeds from the assignee for creditors of the tradesman:

Held, that the securities were accessory to the debt; that in equity the transfer of the notes was a transfer of the securities; that the defendant was in no higher position than his assignor, and could not resist the claim to have the receipts accompany the notes; and that it was not material that the relation of assignor and assignee did not immediately exist between the tradesman and the plaintiffs. *Central Bank v. Garland*, 142.

BILLS OF SALE AND CHATTEL MORTGAGES.

1. *Defect—Taking possession—Rights as against subsequent mortgagee—Full amount of mortgage money not advanced—Effect of—Foreign contract as to chattels in Ontario.*—A defect in a chattel mortgage is not cured, as against a subsequent mortgagee, by taking possession of the chattels, where the subsequent mortgage was

made before such possession, although at the time of the seizure there was no default under the subsequent mortgage, and the mortgagor was by the terms of it entitled to retain possession until default.

Where the full amount mentioned in a chattel mortgage is not actually advanced at the date at which it is given, it should, nevertheless, in the absence of fraudulent intent or bad faith, stand as against a subsequent mortgagee as a security for the amount actually advanced at the time when the subsequent mortgagee's rights accrued.

The rights of parties resident in a foreign country and there making a contract in regard to goods in Ontario, so far as the formalities of registration or change of possession are concerned, are governed by the law of Ontario.

River Stave Co. v. Sill, 12 O. R. 557, followed. *Marthinson v. Patterson*, 125. See *infra* 3.

2. *Mortgage to secure existing indebtedness—Affidavit of mortgagee—Omission of statement of indebtedness—Affidavit under 6th section of R. S. O. ch. 125, instead of 2nd section—Invalidity.*—A mortgagee under a chattel mortgage to secure an existing indebtedness made the affidavit of *bona fides* required by the sixth section of R. S. O. ch. 125, for a mortgage to secure future advances instead of the affidavit required by the second section:—

Held, that the affidavit was defective in not stating "that the mortgagor was justly and truly indebted to the mortgagee," and that the mortgage could not be looked at to aid the affidavit in this requirement. *The Midland Loan and Savings Co. v. Cowieson*, 583.

3. *Foreign contract as to chattels in Ontario*—*R. S. O. ch. 125—Chattel mortgages not complying with—Effect of taking possession—Full amount of consideration not advanced—Falsity of affidavit of bona fides—Priorities between mortgages—Subsequent mortgages in good faith—Notice.*—*Held*, following *River Stave Co. v. Sill*, 12 O. R. 557, that goods which were in Ontario at the time of the execution of a document of hypothecation of them were subject to the provisions of *R. S. O. ch. 125*, although the parties thereto were at the time domiciled in a foreign country.

Held, also, that the plaintiff could not under his prior chattel mortgage, by taking possession of the mortgaged chattels, after the execution and filing of a subsequent chattel mortgage to the defendant, although before the time at which the defendant could have taken possession, hold the mortgaged goods against the defendant, where the plaintiff's mortgage did not comply with the Act, if the defendant's mortgage had complied therewith.

Judgment of *STREET, J.*, 20 O. R. 125, affirmed on these points.

But where the amount of the consideration for the defendant's mortgage was less than the amount expressed therein and sworn to by the defendant in his affidavit of *bona fides* as the true amount:—

Held, that the defendant's mortgage did not comply with the Act, and the plaintiff, by reason of taking possession as before mentioned, could hold the goods against the defendant.

Robinson v. Paterson, 18 U. C. R. 55, followed.

Hamilton v. Harrison, 46 U. C. R. 127, not followed.

Judgment of *STREET, J.*, reversed on this point:—

Held, also, that the "subsequent purchasers or mortgagees" referred to in sec. 4 of *R. S. O. ch. 125*, are those whose purchases or mortgages are accompanied by an immediate delivery and followed by an actual and continued change of possession, or who have complied with the provisions of the Act; and as neither the plaintiff nor the defendant came within the words, the plaintiff, being prior in point of time, had priority; but if the defendant could be treated as a subsequent mortgagee, he was not a subsequent mortgagee in good faith, by reason of the falsity of his mortgage:—

Held, lastly, doubting, but following *Moffatt v. Coulson*, 19 U. C. R. 341, that notice of the plaintiff's mortgage when he took his own was not a reason for depriving the defendant of the status of a subsequent mortgagee in good faith. *Marthinson v. Patterson*, 720.

BOND.

Bond of indemnity—Actual damages—Judgment received against obligee but not paid.

See *PRINCIPAL AND SURETY*, 1.

BRITISH NORTH AMERICA ACT.

Office of Lieutenant-Governor—Provincial penal legislation—Provincial executive—Royal prerogative—Secs. 65, 92, sub-sec. 1.

See *CONSTITUTIONAL LAW*, 1.

BUILDING SOCIETIES.

1. *R. S. O. ch. 169, sec. 47—"Obligation"—Moneys deposited upon*

savings bank account—"Reasonable doubts"—*Petition—Costs.*]—A person died in the United States of America having moneys to his credit deposited upon savings bank account with two building societies doing business in Ontario, incorporated under R. S. O. ch. 169. An administrator appointed by a Court in the foreign country applied to the building societies to have the moneys transferred to him, but the societies, entertaining doubts whether the words of sec. 47 of R. S. O. ch. 169, "share, bond, debenture, or obligation" applied to a savings bank account, petitioned the Court under sec. 49 :—

Held, that the word "obligation" covered the liability of the petitioners to repay the amount deposited with them :—

Held, also, that the doubts of the petitioners were reasonable and they were entitled to costs. *Re Ging*, 1.

BY-LAW.

Water rates—Discount to consumers — Discrimination against Crown.

See MUNICIPAL CORPORATIONS, 1.

CANADA TEMPERANCE ACT.

1. *Incorporation into, of secs. 62, 64, 66, 67 of R.S.C. ch. 178—Distress, dispensing with—Imprisonment for costs of commitment and conveying to gaol — Warrant of commitment — Excess of jurisdiction—Police Magistrate — Summary conviction drawn up after Act ceased to be in force — Nullity — Conviction not quashed—Evidence of sufficient distress — Non-suit.*]—The defendant

was the salaried police magistrate for the county of Ontario, in which the Canada Temperance Act was in force prior to the 11th May, 1889, when the order-in-council declaring it in force was revoked.

On the 11th January, 1889, the plaintiff was convicted before the defendant of a second offence against the Act, and adjudged to pay a fine of \$100 and \$12.05 costs.

On the 20th March, 1889, the defendant issued a warrant of commitment reciting the plaintiff's conviction before him and the imposition of the fine and costs; declaring that the plaintiff had no goods and chattels; and directing her committal to gaol for sixty days "unless the said several sums and all the costs and charges of the said distress and of the commitment and conveying of the said Nellie Mechiam to the said common gaol, amounting to the further sum of seventy-five cents and shall be sooner paid unto you."

At the trial of an action for the arrest and imprisonment of the plaintiff under this commitment a conviction of the plaintiff was put in dated 11th January, 1889, but which was not drawn up till February, 1890. The conviction adjudged that the plaintiff should pay the penalty and costs according to adjudication, and if these sums were not paid forthwith, then, inasmuch as it had been made to appear that the plaintiff had no goods or chattels whereon to levy by distress, that she should be imprisoned for sixty days unless these sums and the costs and charges of conveying to gaol shall be sooner paid.

The conviction had not been quashed.

It appeared by the examination of the defendant that the seventy-five cents in the warrant was charged for

the warrant, and that the blank was left for the constable to fill in the costs of conveying to gaol. The constable, however, did not fill in the costs, but indorsed a memorandum of them on the back of the warrant, making them \$13.40:—

Held, that the result of secs. 62, 64, 66, and 67 of R. S. O. ch. 178, which are incorporated into the Canada Temperance Act, R. S. C. ch. 106, by virtue of sec. 107, is to enable the convicting magistrate to order the levy by distress of the penalty and costs, to dispense with such levy where he thinks it would be useless or ruinous, and to order the defendant to be imprisoned for a term not exceeding three months unless the penalty and costs, and also the costs and charges of the commitment and conveying to gaol, are sooner paid.

Regina v. Doyle, 12 O. R. 347, followed.

2. That, although the warrant of commitment went beyond the conviction by directing a detention for the costs of the commitment, as well as of conveying to gaol, yet as the only sum for which the gaoler could lawfully have detained the plaintiff was the sum of seventy-five cents mentioned in the warrant, and the costs of conveying to gaol greatly exceeded that sum, there was no excess in the warrant.

3. That, as the only evidence given at the trial with regard to the defendant's appointment as police magistrate was quite consistent with his being in office at a salary under an appointment which did not expire with the Canada Temperance Act, it could not be said that the conviction drawn up in February, 1890, was a nullity.

4. That if the plaintiff was detained on account of the charges of

the constable indorsed on the warrant, it was not the act of the defendant, for he never gave any authority to the constable to require the gaoler to detain the plaintiff for any sum not inserted in the warrant.

5. That, as the conviction stated that it had been made to appear to the magistrate that there was no sufficient distress, and the conviction had not been quashed, evidence would not have been admissible to shew that there was sufficient distress.

6. That the commitment having been authorized by a lawful conviction, which had not been quashed, the plaintiff was properly non-suited.

7. That at all events the defendant was entitled to the protection of R. S. O. c. 73. *Mechiam v. Horne*, 267.

CASES.

Amer v. Rogers, 31 C. P. 195, considered.]—*See* HUSBAND AND WIFE, 6.

Re Breton's Estate, 17 Ch. D. 416, commented upon.]—*See* HUSBAND AND WIFE, 3.

Carter v. Grasett, 14 A. R. dicta of PATTERSON, J., at pp. 709, 710, dissented from.]—*See* EASEMENT, 1.

Clark v. McDonnell, 20 O. R. 564, not followed.]—*See* HUSBAND AND WIFE, 3.

Corham v. Kingston, 17 O. R. 432, specially referred to.]—*See* MISTAKE, 1.

Corporation of the Township of Adjala v. McElroy, 9 O. R. 580, specially considered.]—*See* PRINCIPAL AND SURETY, 2.

Crawford v. Trotter, 4 Madd. 361, distinguished.]—See WILL, 2.

Cumberland v. Kearns, 18 O. R. 151, 17 A. R. 281, commented on and distinguished.]—See SALE OF LAND, 1.

Doe Devine v. Wilson, 10 Moo. P. C. 502, specially referred to.]—See CROWN LANDS, 2.

Hamilton v. Harrison, 46 U. C. R. 127, not followed.]—See BILLS OF SALE AND CHATTEL MORTGAGES, 3.

Hickey v. Stover, 11 O. R. 106, not followed.]—See HUSBAND AND WIFE, 3; LIMITATION OF ACTIONS, 2.

Hindle v. Pollitt, 6 M. & W. 529, followed.]—See LANDLORD AND TENANT, 1.

In re Hobbs, 36 Ch. D. 553, followed.]—See HUSBAND AND WIFE, 3.

Lamond v. Davall, 9 Q. B. 1030, specially referred to.]—See CONDITIONAL SALE, 1.

Lyell v. Kennedy, 14 App. Cas. 437, followed.]—See HUSBAND AND WIFE, 3.

MacLean v. Dunn, 4 Bing. 722, specially referred to.]—See CONDITIONAL SALE, 1.

Re Madden, 31 U. C. R. 333, followed.]—See SESSIONS, 1.

Martin v. Magee, 19 O. R. 705, distinguished.]—See HUSBAND AND WIFE, 2.

Moffatt v. Coulson, 19 U. C. R. 341, followed.]—See BILLS OF SALE AND CHATTEL MORTGAGES, 3.

Morley v. Attenborough, 3 Ex. 500, commented on and distinguished.]—See SALE OF GOODS, 1.

Mykel v. Doyle, 45 U. C. R. 65, followed.]—See EASEMENT, 2.

Nolan v. Fox, 15 O. P. 565, specially referred to.]—See CROWN LANDS, 2.

Pearce v. Brooks, L. R. 1 Ex. 217, followed.]—See CONTRACT, 2.

Regina v. Bishop of Huron, 8 C. P. 253, specially referred to.]—See CROWN LANDS, 2.

Regina v. Brady, 12 O. R. 358, considered.]—See INTOXICATING LIQUORS, 1.

Regina v. Doyle, 12 O. R. 347, followed.]—See CANADA TEMPERANCE ACT, 1.

Regina v. Excell, 20 O. R. 633, followed.]—See INTOXICATING LIQUORS, 6.

Regina v. Flynn, 20 O. R. 638, followed.]—See INTOXICATING LIQUORS, 5.

Regina v. Hart, 20 O. R. 611, followed.]—See SESSIONS, 1.

Regina v. Hartley, 20 O. R. 481, followed.]—See INTOXICATING LIQUORS, 2.

Regina v. Higgins, 18 O. R. 148, considered.]—See INTOXICATING LIQUORS, 1.

River Stave Co. v. Sill, 12 O. R. 557, followed.]—See BILLS OF SALE AND CHATTEL MORTGAGES, 1, 3.

Robinson v. Paterson, 18 U. C. R. 55, followed.]—See BILLS OF SALE AND CHATTEL MORTGAGES, 3.

Seroka v. Kattenburg, 17 Q. B. D. 177, considered.]—See HUSBAND AND WIFE, 6.

Switzer v. McMillan, 23 Gr. 538, not followed.]—See LIMITATION OF ACTIONS, 2.

United States v. Sanborn, 135 U. S. R. 271, specially referred to.]—See MISTAKE, 1.

Wall v. Stanwick, 34 Ch. D. 763, followed.]—See HUSBAND AND WIFE, 3.

Wills v. Carman, 14 A. R. 656, considered.]—See DEFAMATION, 2.

COERTIORARI.

1. *Right to—Appeal to sessions—R. S. C. c. 178, s. 84.*]—See SESSIONS, 1.

2. *Evidence—Witnesses reading over and signing evidence—Omnia præsumuntur.*]—See INTOXICATING LIQUORS, 3.

COLLATERAL SECURITIES.

Banks and Banking—Discount of promissory notes—Right of bank to recover accessory securities.]—See BANKS AND BANKING, 1.

COMPANY.

1. *Shares as collateral security—Liability to contribution—Bonâ fide holder of shares as fully paid up—Notice—Allowance of discount on shares—Resolution of directors to treat moneys received in part payment of a number of shares as full payment of a portion of the shares—*

Ultra vires.]—The defendant, a director and shareholder of a railway company, lent \$100,000 to the company under a written agreement with the latter and his co-directors, that they would transfer to him fully paid up shares as security. They accordingly transferred to him as fully paid up a number of shares of the par value of \$50 each. Of these seventy-five shares were part of 187 which had been held by a shareholder who had paid \$3,750 upon his 187 shares. The directors resolved to treat this as payment in full of seventy-five shares, and they got the shareholder to transfer these seventy-five shares as fully paid up to the defendant :—

Held, in an action by an execution creditor with writs returned *nulla bona*, that this was *intra vires* of the company, and the seventy-five shares were held by the defendant as fully paid up.

As to the balance of the shares so transferred to the defendant, it appeared that a discount had been allowed upon them; but that the defendant had no notice or knowledge of this fact, and would not have accepted them had he not *bonâ fide* believed them to be fully paid up, as was represented to him by the directors of the company who transferred the same :—

Held, that in the defendant's hands these shares must be considered as fully paid up. *Corporation of Town of Thorold v. Neelon*, 86.

2. *Contributory—Petition for incorporation—Statement as to shares therein—Estoppel—R. S. O. ch. 157.*]—Where in winding up proceedings it appeared that an alleged contributory joined in the petition for incorporation, wherein

it was untruly stated that he had taken 250 shares of the capital stock, whereas the shares he held, had after incorporation, been voted to him by a resolution of the directors as paid up stock, for services in connection with the formation of the company:

Held, that in view of the provisions of the Ontario Joint Stock Companies' Letters Patent Act, he was liable to be held a contributory in respect of, at the least, the number of shares voted to him.

Semble. He was liable for the full number of shares mentioned in the petition. *Re Collingwood Dry Dock Ship Co., Weddell's Case*, 107.

3. *Calls*—*Allotted stock*—*R. S. O. ch. 157, sec. 45*—*Transfer of shares*—*Validity of*.]—A call upon shares under the Joint Stock Companies' Act, R. S. O. ch. 157, means a call made by the directors in pursuance of the powers given to them by sec. 44 of that Act.

An otherwise valid transfer of shares allotted to the transferor upon which he has not paid anything, no calls having been made at the time of transfer, is not invalid because the ten per centum upon allotted stock directed by sec. 45 of the Act to be "called in and made payable within one year from the incorporation of the company" has not been paid.

The last mentioned section is directory merely. *Ontario Investment Association v. Sippi*, 440.

CONDITIONAL SALE.

1. *Right to resume possession, sell, and sue for balance of purchase money*—*51 Vict. ch. 19 (O.)*.]—The plaintiffs sold to the defendant a machine under a written agreement, whereby

the price was secured by promissory notes, and the property was not to pass until payment in full, and on default the whole price was to become due, and the vendors might resume possession; but there was no provision as to any right of resale.

Default having occurred in payment of the note first falling due, the plaintiffs resumed possession, resold the machine, and, after giving credit for the proceeds, sued the defendant for the balance of the original price:—

Held, per *BOYD, C.*, dissenting from the decision of *ARMOUR, C. J.*, at the trial, that the plaintiffs were entitled to judgment.

Difference between American and English authority pointed out:—

Held, per *ROBERTSON, J.*, *contra*, that by resuming possession the plaintiffs put an end to the contract of sale, and had no longer any right of action in respect to it:—

Held, also, per *ARMOUR, C. J.*, that *51 Vict. ch. 19 (O.)*, as to conditional sales is not retrospective; and per *BOYD, C.*, that its provisions are declaratory of the common law in providing for a resale in case of default.

Lamond v. Davall, 9 Q. B. 1030, and *MacLean v. Dunn*, 4 Bing. 722, specially referred to. *Sawyer v. Pringle*, 111; and in Appeal, 18 A. R. 218, affirming *Armour, C. J.*

CONDITIONS OF SALE.

See *VENDOR AND PURCHASER*, 1.

CONSTITUTIONAL LAW.

1. "*British North America Act*"—"*Act respecting the executive administration of the laws of this province*"—*51 Vict. ch. 5 (O.)*.]—*Presumption in favour of validity of*

Act—Objection to form of statute—Office of Lieutenant-Governor—Criminal law—Provincial penal legislation—Royal prerogative—Parliamentary government—B. N. A. Act, secs. 65, 92.]—*Held*, that the Ontario Statute 51 Vict. ch. 5, entitled “An Act respecting the executive administration of the Laws of this Province,” whereby the pardoning power in certain cases, and other executive functions, are vested in the Lieutenant-Governor, is *intra vires* of the Provincial Legislature.

An enactment couched in general language, is not to be held invalid by reason of any ambiguity, as to what is covered, arising therefrom. Language, large or loose, is to be shaped by presuming an intention to act with candour and within the bounds of constitutional competence.

The intention of sec. 92, sub-sec. 1, of the B. N. A. Act, is to keep intact the headship of the Provincial government, forming as it does, the link of federal power; no essential change is possible in the constitutional position or functions of this chief officer, but that does not inhibit a statutory increase of duties germane to the office.

Though there may exist no direct or immediately representative co-ordination of Queen and people in the Provincial Assembly, yet sovereign power is a unity, and though distributed in different channels and under different names it must be politically and organically identical throughout the Empire.

The Act in question may be classified as one made in relation to the imposition of punishment; or from another point of approach, it may be covered by the provisions for the “administration of justice in the province”:—

Held, also, that section 2 of the 94—VOL. XX. O.R.

Act in question properly construed, refers to offences under existing laws enacted by the province, or to laws operating therein passed by the old Province of Canada or Great Britain, in regard to matters which fall within those assigned to provincial legislation by the B. N. A. Act. *Attorney-General of Canada v. Attorney-General of Ontario*, 222.

CONTRACT.

1. *Conveyance—Merger of contract in conveyance—Non-completion of houses by stipulated time—Measure of damages.*]—The defendant an assignee for creditors agreed with the plaintiff to exchange five houses then in course of erection, for certain lands of the plaintiff. By the contract which was dated March 24th, the houses were to be completed by May 30th, similar to certain houses on O. street. Mutual conveyances were to be exchanged between the parties within sixty days, i.e., by May 24th, but as a matter of fact they were executed and exchanged about May 9th. The plaintiff subsequently in the present action claimed damages for non-completion of and defects in the finishing of the houses.

The deed from the defendant contained no covenants covering the matters complained of:—

Held, nevertheless, that the plaintiff was entitled to recover on the original contract.

A contract to perform work or to do things for the other contracting party on a sale of lands at a period after the time fixed by the same contract for the execution and final delivery of the formal conveyance, does not become merged in the conveyance.

Held, also, that the loss of rents

which might have been obtained for the houses if completed at the proper time was a proper measure of damages, the contracting parties having known that the houses were intended to be rented. *Smith v. Tenant*, 180.

2. *Canada Temperance Act—Sale of liquors for use in county where Act in force—Avoidance of contract—Repeal of Act—Effect of on contract.*—In an action for the price of liquors supplied with the knowledge that they were for use in a county in which the Canada Temperance Act was in force, part of which were sold prior to a vote for the repeal of the Act, and the remainder subsequent to a successful vote for its repeal, but before the order in council bringing the Act into force had been revoked:—

Held, that the price of the liquors sold before were not, but that of those sold after the successful vote were recoverable.

Pearce v. Brooks, L. R. 1 Ex. 217, followed.] See *Smith v. Benton*, 344.

Acceptance of bad work—Contract to make pews—Occupation of pews after objection taken to their quality.—See *MECHANICS' LIEN*, 2.

CONVEYANCE.

Conveyance to husband and wife in 1874—Tenants in common.—See *HUSBAND AND WIFE*, 2.

By husband direct to wife—Equitable estate in wife—Husband trustee of legal estate.—See *HUSBAND AND WIFE*, 3.

CONVICTION.

Admissibility of defendant as a witness—Divisional Court—Objection taken for first time on appeal.—See *SESSIONS*, 1.

Not following minute—Bias.—See *INTOXICATING LIQUORS*, 2.

Certiorari—Witnesses reading over and signing evidence—Omnia præsumuntur.—See *INTOXICATING LIQUORS*, 3.

Waiver of summons or information—Validity of conviction—Misdemeanour.—See *INTOXICATING LIQUORS*, 5.

COSTS.

Appeal to sessions—Power to award.—See *SESSIONS*, 1.

COVENANT.

To occupy premises only as private dwelling and gent's furnishing store—Holding of auction sales—Breach.—See *LANDLORD AND TENANT*, 2.

CRIMINAL LAW.

1. *Statements of prisoner to detectives—Admissibility of evidence.*—During the trial of the prisoner for murder questions arose as to the admissibility in evidence of statements made by him to certain detectives, in answer to questions put to him by them, he being at the time in their custody:—

Held, upon a case reserved, that the statements were admissible in evidence. *Regina v. Day*, 209.

2. *Bigamy—Proof of first marriage.*—Upon an indictment for bigamy the first marriage must be strictly proved as a marriage *de jure*.

Evidence of a confession by the prisoner of his first marriage is not evidence upon which he can be convicted. *Regina v. Ray*, 212.

3. *Threatening letter—Accusation of abortion*—"Not less than seven years," meaning of.]—A crime punishable by law with imprisonment for not less than seven years means a crime the minimum punishment for which is seven years; and, as no minimum term is prescribed for the crime of abortion, sending a letter threatening to accuse a person of that crime is not a felony within the meaning of R. S. C. ch. 173, sec. 3. *Regina v. Popplewell*, 303.

4. *Fortune telling*—9 Geo. II. ch. 5.]—The statute 9 Geo. II. ch. 5 is in force in this Province.

By the statute the mere undertaking to tell fortunes constitutes the offence; and a conviction was affirmed where it was obtained upon the evidence of a person who was not a dupe or victim but a decoy. *Regina v. Milford*, 306.

5. *Trial of prisoner by Judge without jury*—Right of Judge to view locality of offence—Absence of prisoner—Questions of law arising on trial.]—The prisoner was tried without a jury by a County Court Judge exercising jurisdiction under the "Speedy Trials Act," upon an indictment for feloniously displacing a railway switch. After hearing the evidence and the addresses of counsel the Judge reserved his decision. Before giving it, having occasion to pass the place, he examined the switch in question, neither the pri-

soner or any one on his behalf being present. The prisoner was found guilty:—

Held, that there was no authority for the Judge taking a "view" of the place, and his so doing was unwarranted; and even if he had been warranted in taking the view, the manner of his taking it, without the presence of the prisoner, or of any one on his behalf, was unwarranted:—

Held, also, that the question whether the Judge had the right to take a view was a question of law arising on the trial, and was a proper question to reserve under R. S. C. ch. 174, sec. 259.

Review of the cases on the questions whether either a Judge or a juror can be properly a witness in a case which he is trying. *Regina v. Petrie*, 317.

6. *Indictment for attempting to prostitute a woman—Evidence of reputation of bawdy house—Admissibility of.*]—On an indictment for attempting to procure a woman to become a common prostitute, in corroboration of her evidence that for such purposes the prisoner had taken her to a bawdy house, evidence of the general reputation of the house is admissible. *Regina v. McNamara*, 489.

7. *Indictment for offering to purchase counterfeit notes—Evidence shewing notes to be genuine, though believed by prisoner to be counterfeit.*]—A person indicted for offering to purchase counterfeit tokens of value cannot be convicted on evidence shewing that the notes which he offered to purchase were not counterfeit, but genuine bank notes unsigned, though he believed them to be counterfeit and offered to purchase under such belief. [GALT, C. J., dissenting].

In the course of a conversation between the prisoner and a detective relative to the purchase of counterfeit money, the prisoner asked the detective whether he had received a letter written by the former stating his desire to purchase counterfeit money; and upon the detective shewing prisoner the letter he admitted it was his:—

Held, that the letter was admissible as in a sense forming part of the subject matter of the conversation. *The Queen v. Attwood*, 574.

CROWN LANDS.

1. *Patent to land—Locatee receipt—Fraudulent locatee—Statute of Limitations—R. S. O. ch. 24, sec. 16.*—One through whom the plaintiff claimed obtained in 1855 from the commissioner of crown lands a receipt on sale of a certain lot of land. In 1868, B., in whose possession this receipt was, handed it back to the crown lands office, and by means of fraud procured his own name to be substituted as purchaser in the books of the department; and he and those claiming under him, including the defendant, had remained in possession of the lot ever since. In 1872, the plaintiff, having learned of the imposition, applied to the department for redress. This application was pending and undisposed of by the Commissioner till March 14th, 1889, when it was ordered that the patent should issue to the defendant, but three months were allowed to the plaintiff to take proceedings in Court to establish his title; and within that time the plaintiff commenced this action for a declaration as to his right to the land:—

Held, affirming the decision of

FERGUSON, J., that the plaintiff's right of action was not barred by any Statute of Limitation.

Per BOYD, C. The case might be likened to a matter litigated in the proper forum wherein no decision is given till after the lapse of years:—

Held, *per* FERGUSON, J. (ROBERTSON, J., dissenting), that even if the Statute of Limitations did commence to run against those under whom the plaintiff claimed, it ceased to do so on rescission of the sale and the substitution of B.'s name in 1868, because then all right to bring an action or make an entry on their part ceased. *McLure v. Black*, 70.

2. *Crown patent—Construction—Land described as “north part” of lot—Uncertainty—Tax sale—Adverse occupation—R. S. O. ch. 193, sec. 191.*—A patent of land from the Crown is to be upheld rather than avoided and to be construed most favourably for the grantee.

Where land was granted by a Crown patent describing it as the north part of lot 13, containing sixty acres, and the original plan of the township shewed the lot with centre line running through the concession and shewed the part south of the line as one hundred acres, and the part north of the line as eighty acres, and it appeared that, prior to the grant of the north part, there had been a grant of the southerly part, containing one hundred acres, describing it by metes and bounds, which were evidently intended to include all the land south of the line, although they actually fell short of doing so:—

Held, in a contest between the plaintiff claiming under the patentee of the north part and the defendant claiming under sales for taxes based upon the lands sold being patented

lands, that the patent was not void for uncertainty, but that under the words "the north part" the whole of the lot lying to the north of the centre line passed to the grantee and those claiming through him.

Doe Devine v. Wilson, 10 Moo. P. C. 502; *Nolan v. Fox*, 15 C. P. 565; *Regina v. Bishop of Huron*, 8 C. P. 253, specially referred to.

At the time of the conveyances to the plaintiff's predecessor in title and to himself, the defendant was in adverse occupation of lands sold for arrears of taxes, having a *bond fide* claim or right thereto, derived mediately under the sale for taxes:—

Held, that, although the sales may have been invalid, sec. 191 of R. S. O. ch. 193 applied to them, and the conveyances, as regards the lands sold for taxes, were void; and want of knowledge of the adverse occupation, on the part of the plaintiff and his predecessor, could not alter their effect. *Hyatt v. Mills*, 351.

DAMAGE.

Non-completion of houses by time contracted for—Measure of damages.] See CONTRACT, 1.

DEFAMATION.

1. *Libel—Resolution passed at meeting—Letter published in newspapers—Accusation of conspiracy—Innuendo—Plaintiff not named—Surrounding circumstances—Excessive damages—Evidence of occurrences at meeting—Admissibility—Privilege.*]—The plaintiff, who was employed by a manufacturing company of which the defendant was president, brought an action for the

seduction of his daughter against the superintendent of the company. Particulars in regard to the alleged seduction having appeared in public newspapers, a meeting of some of the members and servants of the company was held, at which the defendant presided, and a resolution was passed expressing confidence in the innocence of the superintendent of the alleged seduction. A letter was then or immediately afterwards drawn up and signed by a number of the persons present, including the defendant, handed to a reporter for publication, and was published in several newspapers, without any objection on the defendant's part.

The letter was addressed to the superintendent, referred to the charges against him which had appeared in the newspapers, declared the belief of the signers in his innocence, and concluded, "We believe you are the victim of a conspiracy as base and ungrateful as was ever sprung on an innocent man, and we pledge ourselves to stand by you until your innocence shall have been clearly established or until—which we are confident will never be—you are shewn to be the monster depicted in the public press." The plaintiff was not named in the letter.

The plaintiff sued the defendant for libel in consequence of the publication of this letter. The innuendo was that the plaintiff was guilty of the offence of conspiring and agreeing with his daughter to defame and slander or otherwise injure the reputation and character of the superintendent. The whole question of libel or no libel was left to the jury, who found for the plaintiff with \$1,500 damages:—

Held, that it was not necessary to decide whether the letter could be construed as supporting the innu-

endo of a criminal conspiracy; the question really was whether the defendant had libelled the plaintiff; and this question had been determined by the jury.

2. That the surrounding circumstances were admissible in evidence for the purpose of shewing that persons conversant with those circumstances might naturally conclude that the plaintiff was the person aimed at by the letter; and it was enough that the circumstances and the libel taken together pointed to some one, and that the jury found the plaintiff to have been the person intended.

3. That the verdict of the jury could not be interfered with on the ground that the damages were excessive.

4. That the evidence of what took place at the meeting was admissible as proof that the plaintiff was the person intended by the resolution passed at it, the defendant having been present; and that a witness who was present at the meeting and took notes, which were afterwards printed, could refer to the printed copy, after the destruction of the original notes, to shew exactly what did take place.

5. That the occasion was not one of privilege or qualified privilege. *Taylor v. Massey*, 429.

2. *New trial—Slander—Finding by jury of no damages; but no finding as to the slander—Jury.*—In an action for slander the jury returned a finding of no damage; but said they could not agree as to whether their verdict should be for the plaintiff or defendant; upon which the trial Judge directed judgment to be entered for the defendant, dismissing the action:—

Held, that the finding of no dam-

age did not dispose of the action, but that there should have been a finding on the charge of guilt; and a new trial was directed.

Wills v. Carman, 14 A. R. 656, considered. *Bush v. McCormack*, 497.

DEVOLUTION OF ESTATES ACT.

Conveyance of land by administrator—Debts.—See HUSBAND AND WIFE, 2.

DIVISION COURT.

Setting aside attachment.—See PROHIBITION, 1.

DONATIO MORTIS CAUSA.

1. *Delivery of keys of box and rooms containing valuables.*—Shortly before his death the plaintiff's uncle delivered to her his watch and pocket-book, and also the keys of his cash box, which was then in the actual possession of his solicitor, and of two rooms, in which were contained securities for money and chattels, accompanying the delivery with words of gift having reference to the articles actually delivered.

Held, per ROSE, J., upon the evidence, that the deceased intended to give to the plaintiff what the keys placed in her control, and to part with the possession and dominion of the cash box and its contents, and of the rooms and their contents; and upon the law that the intention of the deceased should be given effect to and a valid *donatio mortis causa* declared.

Held, on appeal, [reversing the decision of ROSE, J.] that as regards the contents of the box and the property in the rooms, the alleged gift

had not been made out, and *nodonatio mortis causâ* was established, otherwise decision of Rose, J., affirmed. *Hall v. Hall et al.*, 168, 684.

EASEMENT.

1. *Severance of tenement by conveyance—Rights of drainage and aqueduct—Implied grant—Express grant—Notice—Registry laws.*—Where the owner of two adjoining lots of land conveys one of them, he impliedly grants all those continuous and apparent easements, including rights of drainage and aqueduct, over the other lot which are necessary for the reasonable use of the property granted, and which are at the time of the grant used by the owner of the entirety for the benefit of the part granted.

The grant of such an easement, if implied, is not within the provisions of the Registry Act, and prevails over a subsequent purchaser, without notice, of the adjoining lot; if express, its due registration on the lot conveyed is notice thereof to a subsequent purchaser of the adjacent lot without registration thereon.

Dicta of PATTERSON, J. A., in *Carter v. Grasett*, 14 A. R. at pp. 709, 710, dissented from. *Israel v. Leith*, 361.

2. *Grant of lands with right to use of springs on adjoining lands—Access to springs—Right to lay pipes to springs—Prescriptive rights—Enjoyment for twenty years—Interruption after twenty years—R. S. O. ch. 111, secs. 35, 37—Unoccupied lands—Owners absent—License—Revocation of—Possession—Extinguishing easement—Registry laws—Notice—Mortgagor and mortgagee.*—The plaintiff claimed through the

defendant's predecessor in title the right to use two springs, C and E, under conveyances in 1841 and 1843 of lands north of the springs. One conveyance granted the sole and perpetual right to spring C, together with the right to use a road from the southern boundary of the land granted to the spring; the other granted the sole and perpetual use of and right to the water of spring E, without indicating the manner in which the water was to be approached or its enjoyment had. The defendant was the owner of the land to the south upon which the springs were situated. The water had been carried from the springs by means of pipes through the defendant's land to the plaintiff's land, from 1861 to 1882 or 1883, when the defendant tore up the pipes, insisting that the then owner of the plaintiff's land had no right to maintain them, and thereupon an arrangement was made under which the pipes were again put down with the addition of certain troughs for the convenience of the defendant's cattle:—

Held, that under the conveyances the plaintiff had a right of access to spring C by the road mentioned, and to spring E by a convenient road to be laid out, but had no right to the easement of conveying the water by pipes through the defendant's land.

The result of the interruption in 1882 or 1883 and the arrangement then made was that since that time the plaintiff must be taken to have maintained the pipes, not as a matter of right, but by the license of the defendant; under secs. 35 and 37 of the R. S. O. ch. 111, the fact that twenty years had expired before the interruption was immaterial; and therefore the plaintiff had not acquired a prescriptive right to the easement.

The fact that for nearly the first half of the period from 1861 to 1881 or 1883, the land over which the easement was claimed was unoccupied, and its owners out of the country, constituted another objection to the acquisition of a prescriptive right under sec. 35.

The license of the defendant under which the pipes were maintained since 1882 or 1883, being by parol, was determinable at any time by the defendant; and the defendant in subsequently taking up the pipes, which led to the bringing of this action, was acting within his strict legal right of revoking the license; and the plaintiff was not entitled to damages for their removal, or for disturbing the ground in which they lay whereby the water was rendered impure.

The possession by the defendant of the land through which access to the springs was to be had, for upwards of ten years, did not extinguish the plaintiff's right of access.

Mykel v. Doyle, 45 U. C. R. 65, followed.

Before the conveyances of 1841 and 1843, G., the then owner of all the lands now in question, conveyed them to M. by a deed absolute in form, but really intended as a mortgage, and in 1857, in a redemption suit brought by persons who had acquired the equity of redemption from G., after the registration of the conveyances of 1841 and 1843, it was declared that this conveyance was a mortgage only, and in 1858 a conveyance was made by the representatives of G., pursuant to the decree, reciting the payment of the mortgage moneys and conveying the lands to the plaintiffs in the redemption suit. The defendant claimed the land upon which the springs were situated under the grantees in the conveyance of 1858:—

Held, that the defendant was affected under the Registry Acts with notice that M. was a mortgagee only, and that those who redeemed him did so as owners of the equity; and the defendant could not set up the estate of the mortgagee, which, upon payment of the mortgage, was a bare legal estate, carrying with it no rights as against the beneficial owners of the land. *McKay v. Bruce*, 709.

ESTOPPEL.

1. *Execution creditor—Purchase of mortgage by—Denial of mortgagor's title—Fraudulent conveyance.*—An execution creditor who purchases and takes a transfer of a mortgage of property is not estopped thereby from setting up in an action against him for the seizure of the same property under his execution against the grantor of the mortgage, that the said grantor was not the owner of the property in question and that the conveyance to the mortgagor by him was fraudulent and void as against the creditors of the latter. *Gordon v. Proctor*, 53.

Mesne profits—Ejectment—Claim in former action.] See *Landlord and Tenant*, 1.

EVIDENCE.

1. *R. S. O. ch. 61, sec. 9—Conviction—Offences under by-law—Admissibility of evidence of defendant.*—On the trial of an offence against a city by-law in the erection of a wooden building within the fire limits, the defendant is not either a competent or compellable witness; and, therefore, where in such a case,

the defendant's evidence was received, and a conviction made against him, it was quashed with costs. *Regina v. Hart*, 611.

Libel and slander—Surrounding circumstances—Evidences of occurrences at meeting—Refreshing memory from printed copy of original notes.] See DEFAMATION, 1.

Admissibility of statements by prisoner to detectives.] See CRIMINAL LAW, 1.

Bigamy—Confession of prisoner of his former marriage.] See CRIMINAL LAW, 2.

Indictment for attempting to prostitute a woman—Evidence of reputation of bawdy house—Admissibility of.] See CRIMINAL LAW, 6.

Indictment for offering to purchase counterfeit notes—Evidence shewing notes to be genuine, though believed by prisoner to be counterfeit—Admissibility of letters forming part of conversation.] See CRIMINAL LAW, 7.

Privilege—Examination of defendant—13 Eliz. c. 5, s. 3.] See FRAUDULENT TRANSFER OF GOODS, 1.

EXECUTION.

1. *Free grants and homesteads—Exemption from execution—Interest of original locatee as mortgagee after alienation.*] The judgment of *Boyd, O.*, 19 O. R. 422, affirmed. *Cann v. Knott et ux.*, 294.

EXECUTORS AND ADMINISTRATORS.

1. *Executor becoming bankrupt and intemperate—Injunction restraining*
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interfering with assets, and appointment of receiver.]—Where a person named as an executor was at the time of the making of the will in excellent credit and circumstances, but before the death of the testator became insolvent and made an assignment for the benefit of his creditors, and also apparently became intemperate, an injunction was granted restraining him from interfering with the estate; and the appointment of a receiver was directed. *Johnson v. McKenzie*, 131.

Trusts and trustees—Taking securities in name of one of two joint executors and trustees, as trustee—Termination of executorship—Right to sell or pledge—Misapplication of moneys advanced—Breaches of trust Notice to pledgees—Following securities—Burden of proof—Infant executor.]—See TRUST AND TRUSTEES, 1.

FRAUDULENT CONVEYANCE.

1. *Voluntary settlement—Conveyance of land to wife—Attacking creditor—Claim under \$40.*]—A creditor for an amount under \$40 cannot attack a conveyance of land as voluntary or fraudulent, and he cannot improve his position by bringing his action on behalf of other creditors. *Zilliox v. Deans, et al.*, 539.

2. *Fraudulent preference—R. S. O. ch. 124, sec. 2—Surety, before payment by him not a creditor.*]—To avoid a transfer as a fraudulent preference under R. S. O. ch. 124, sec. 2, the person to whom it is made must be a creditor in respect of the transaction attacked; and a surety for an insolvent who has not paid the debt for which he is surety, is

not a creditor within the meaning of the Act. *Hope v. Grant*, 623.

See FRAUDULENT TRANSFER OF GOODS, 1.

FRAUDULENT TRANSFER OF GOODS.

1. *Action to set aside—Joinder of action for recovery of penalty—Notes, goods, and chattels—Evidence—Privilege—13 Eliz. ch. 5, sec. 3.*—An action by the party aggrieved to recover the moiety of the penalty imposed by sec. 3 of 13 Eliz. ch. 5, may be joined with an action to set aside a fraudulent transfer under that Act, in this case the transfer of certain promissory notes.

Bills and notes are, by virtue of the legislation passed since 13 Eliz., goods and chattels within that Act.

Sec. 28 of the R. S. O. ch. 173, only applies to the concluding part of said sec. 3, namely that relating to imprisonment on conviction, etc.

Where a defendant at the trial raises no claim of privilege, if any such exists, to his being examined in support of a claim for the recovery of the penalty under the statute of Elizabeth, such claim cannot afterwards be set up on appeal to the Divisional Court. *Miller v. McTaggart*, 617.

FREE GRANTS AND HOMESTEADS.

Exemption from execution—Interest of original locatee as mortgagee after alienation.—See EXECUTION, 1.

GAME.

1. *Fishing and shooting rights—Private ownership—Navigable private waters—Waters artificially rendered navigable by public improvements.*—Ownership of land or water, though not enclosed, gives to the proprietor, under the common law, the sole and exclusive right to fish, fowl, hunt, or shoot within the precincts of that private property, subject to game laws, if any; and this exclusive right is not diminished by the fact that the land may be covered by navigable water. In such case the public can use the water solely for *bonâ fide* purposes of navigation, and must not unnecessarily disturb or interfere with the private rights of fishing and shooting.

Where such waters have become navigable owing to artificial public works, the private right to fishing and fowling of the owner of the soil must be exercised concurrently with the public servitude for passage. *Beatty v. Davis et al.*, 373.

GUARANTEE.

1. *Construction of—Limited suretyship for a floating balance—Payment of part of debt—Right to rank upon insolvent estate of principal debtor.*—The plaintiff's testator gave the defendants a guarantee in the following terms: "In consideration of the goods sold by you on credit to M., and of any further goods which you may sell to M. upon credit during the next twelve months from date, I hereby undertake to guarantee you against all loss in respect of such goods so sold or to be sold, provided I shall not be called on in any event to pay a greater amount than \$2,500."

The whole debt owing to the defendants by M. at the expiration of the period limited by the guarantee was \$5,556. M. made an assignment for the benefit of his creditors. The plaintiff paid the defendants \$2,500, and claimed to rank upon the estate of M. in respect thereof:—

Held, STREET, J., dissenting, that the guarantee was a limited suretyship for a floating balance, and was to be construed as applicable to a part only of the debt, co-extensive with the amount of the guarantee; and the plaintiff was entitled to a dividend from the estate of M. in respect of the \$2,500 paid.

Judgment of STREET, J., 19 O. R. 230, reversed. *Martin v. McMullen*, 257.

HIGHWAYS.

Road washed away by water of lake—Duty to repair—Difference between reparation and restoration.—See MUNICIPAL CORPORATIONS, 3.

HUSBAND AND WIFE.

1. *Conveyance of land to wife directly—Devise of land by wife—Tenancy by the curtesy—Adverse possession—Statute of Limitations—Infants—R. S. O. ch. 111, sec. 43—Devise of land conveyed to married woman by strangers.*—A conveyance of land from a husband to his wife, directly, was made in 1870, was expressed to be in consideration of "respect and of one dollar," was in the usual statutory short form, and was duly registered. The marriage was in 1854:—

Held, that the lands passed by conveyance to the wife as her separate property.

The wife died in 1872, having made a will leaving her real estate to her two daughters, then aged respectively seventeen and twelve. The father remained in sole possession from the mother's death till his own death in 1890. This action was begun in 1890 by the younger daughter and the son of the elder to recover possession from the devisee of the husband:—

Held, that the husband had no title by the curtesy, because he was excluded by the devise to the daughters of the lands conveyed by him to his wife; he was therefore not rightfully in possession as against the daughters; and, as the younger daughter had by R. S. O. ch. 111, sec. 43, only five years after coming of age to begin proceedings, the action was barred as to these lands.

Other lands were conveyed to the wife by strangers in 1867 and 1869, of which the husband also remained in possession after her death:—

Held, that the devise of these lands by her did not affect the right of her husband as tenant by the curtesy, and his possession was in that character; and therefore as to these lands the action was not barred. *Kent et al. v. Kent*, 158. See *infra* 3.

2. *Conveyance to, in 1874—Tenants in common—Devolution of Estates Act—Conveyance of land by administrator—Debs.*—Land was conveyed in 1874 to a husband and wife, who were married in 1864:—

Held, that they took like strangers, not by entireties, but as tenants in common:—

Held, also, that the husband could by virtue of the Devolution of Estates Act, as administrator of the wife, and in his own right, make a valid conveyance of the whole of the

land, although there were no debts of the wife to pay.

Martin v. Magee, 19 O. R. 705, distinguished.

Re Wilson and Toronto Incandescent Electric Light Company, 397.

3. *Conveyance of land to wife directly—Equitable estate in wife—Husband trustee of legal estate—Devise of land by wife to infant children—Possession by husband—Natural guardian—Statute of Limitations.*]—A husband, who was married in 1854, made a conveyance of lands direct to his wife in 1870, which was expressed to be in consideration of "respect and of one dollar," was in the usual statutory short form, and was duly registered:—

Held, affirming the decision of *Boyd, C.*, ante p. 158, that the conveyance had the effect of conveying the equitable estate in the lands to the wife, leaving the legal estate in the husband as trustee thereof for the wife.

A gift from a husband to a wife is not an incomplete gift by reasons of the incapacity of the wife at law to take a gift from her husband.

Re Breton's Estate, 17 Ch. D. 416, commented upon.

The wife died in 1872, having made a will leaving her real estate to the two daughters of herself and husband, who were then aged respectively seventeen and twelve. The husband remained in possession during the wife's life, and from her death till his own death in 1890. This action was begun in 1890 by the younger daughter and the son of the elder to recover possession from the devisee of the husband:—

Held, reversing the decision of *Boyd, C.*, that the Real Property

Limitation Act did not apply so as to extinguish the rights of the plaintiffs to recover; the presumption being that the husband, after conveying to his wife, was in possession of the lands and in receipt of the rents and profits, for and on behalf of his wife; and that, upon his wife's death, he entered into possession and receipt for and on behalf of his infant children and as their natural guardian; and this being so his possession and receipt were the possession and receipt of his wife, and after her death, of his children and those claiming under them; and the statute, therefore, never began to run.

Wall v. Stanwick, 34 Ch. D. 763; *In re Hobbs*, 36 Ch. D. 553; *Lyell v. Kennedy*, 14 App. Cas. 437, followed.

Hickey v. Stover, 11 O. R. 106; *Clark v. McDonnell*, this volume p. 564 not followed. *Kent et al. v. Kent*, 445.

4. *Indian marriage—Evidence of lawful marriage—Declarations of deceased husband as to—Legitimacy of children.*]—In proof of the celebration of a marriage evidence was given that the husband who had gone from this province to British Columbia, had gone through the ceremony of marriage according to the Indian custom with an Indian woman, he paying \$20 to her father; and that after the marriage they cohabited and lived together as man and wife, and were recognized by the Indians as such up to the time of the wife's death, prior to 1879, the giving of presents and cohabitation being regarded by the tribe as constituting a marriage. The issue of the union were two children, a daughter and another child who died. About 1879, the husband returned to this pro-

vince bringing the daughter with him. Evidence was also given of declarations made by the husband on his return that he had been legally married in the same manner as he would have been had the marriage taken place here, and that the daughter was his legitimate child; and that he had brought her up as such:—

Held, that, apart from the Indian marriage, there was evidence from which a legal marriage according to the recognized form amongst Christians could be presumed, and that the daughter was therefore his legitimate child and “legal heir.” *Robb v. Robb et al.*, 591.

5. *Separate estate of woman married in 1869—Lands acquired before and after 1st July 1884—R. S. O. ch. 132, sec. 7—R. S. O. ch. 134, sec. 3—Tenancy by the curtesy—Sale of separate estate, subject to.*]—The effect of R. S. O. 1877, ch. 125, sec. 3 (now R. S. O. ch. 132, sec. 4, subsec. 5) is to deprive the husband of any estate, by the curtesy or otherwise, *during the life of the wife*, in the lands to which the section applies, being those acquired before or after marriage by a woman married between 5th May, 1859, and 2nd March, 1872.

By sec. 5 of 47 Vict. ch. 19 (now R. S. O. ch. 132, sec. 7) the *jus disponendi* was given to the married woman, and by it lands acquired by her after the 1st July, 1884, became her separate estate.

The amendment made by sec. 22 of 47 Vict. ch. 19 (now embodied in R. S. O. ch. 134, sec. 3) enabled the married woman to dispose of her real estate without regard to the date of her marriage or of the acquisition of the property; but under it she can convey her own estate only and not any estate to which her hus-

band may be entitled by the curtesy after her death; while under sec. 7 of ch. 132 she can convey free from his estate by the curtesy.

Where a woman married in 1869 acquired by conveyances from strangers, lands in Etobicoke in 1879 and 1882 and lands in Parkdale in March, 1887, and was in the lifetime of her husband sued upon promissory notes made after March, 1887:—

Held, that all the lands were her separate estate liable for her debts; but the Etobicoke lands were subject to the possible right of her husband to hold them after her death, she dying seized intestate, for his life, in case he survived her, as tenant by the curtesy, and that subject to this possible estate of her husband they were liable to be seized and sold for the satisfaction of the plaintiff's claim. *Moore v. Jackson, et al.*, 652.

6. *Marriage prior to 1884—Tort of wife—Joinder of husband as defendant.*]—Action against a husband and wife alleged to have been married before 1884, for a tort committed by the wife:—

Held, on demurrer, that the husband was properly joined as a party.

Amer v. Rogers, 31 C. P. 195, and *Seroka v. Kattenburg*, 17 Q. B. D. 177, considered. *Lee v. Hopkins*, 666.

IMPLIED GRANT.

Severance of tenement by conveyance—Rights of drainage and aqueduct—Notice—Registry laws.]—See EASEMENT, 1.

INFANT.

Surrogate guardian—Power to lease lands—Possession before and after maturity of infant.]—See LIMITATION OF ACTIONS, 2.

INJUNCTION.

1. *Restraining proceedings in Montreal Court—Winding up proceedings—R. S. C. c. 129.*—Injunctions granted to restrain proceedings in a Montreal Court against a bank in process of being wound up in Ontario, under the Dominion Winding-up Act, and also such proceedings against the liquidators appointed in the winding up for things done in their official capacity, and from attacking the validity of their appointment. *Re Central Bank, Baxter v. Central Bank*, 214.

INSURANCE.

1. *Life—Endowment participating plan—Right of insured to profits—Divisible surplus—Discretion of actuary and directors—Statements of company in letters and pamphlets.*—The plaintiff insured with the defendants upon their "endowment participating plan," and by the contract of insurance the defendants agreed to pay him at the end of a specified period, if he survived, a certain sum, together with his share of the profits made in that branch of the business during the period.

The plaintiff, being dissatisfied with the share allotted to him, claimed an account and payment of his share of all the profits. The defendants claimed the right to hold a portion of their apparent surplus to ensure the future stability of the company:—

Held, that the plaintiff was bound to acquiesce in the discretion of the actuary and directors of the company, *bonâ fide* exercised, and to take his share of what was apportioned as divisible surplus; and that being so, that his case was not advanced

by statements made by officers of the company in letters or pamphlets as to the course pursued by them in dividing the surplus. *Buin v. Etna Insurance Co.*, 6.

2. *Marine insurance—General average contribution—Attempt to rescue vessel and cargo—Common danger—Average bond—Adjustment—Expenditure—Liability of owners of cargo.*—The judgment of *BOYD, C.*, 19 O. R. 462, affirmed. *Western Assurance Co. v. Ontario Coal Co.*, 295.

3. *Life insurance—Benevolent society—Endorsement on policy—Subsequent devise of moneys repugnant to endorsement—Executors disqualified as trustees—Appointment of trustee—R. S. O. ch. 136, sec. 5.*—A testator insured his life in a benevolent society, the policy being payable to his "widow or orphans or personal representatives," and afterwards endorsed on the policy a direction that the same should be paid to his infant daughter. Subsequently by his will he devised the proceeds of the policy with other moneys to his executors upon certain trusts:—

Held, that the will was inoperative so far as it assumed to deal with the policy which was by the endorsement clothed with a statutory trust under section 5 of R. S. O. ch. 136, in favour of the daughter, and that as the devise to the executors was repugnant to the trust they were not competent trustees within the meaning of section 11 of the above mentioned Act.

The mother of the infant having been appointed guardian and having given security for the proper application of the policy moneys was appointed trustee. *Scott et al. v. Scott*, 313.

4. *Life—Devise—Insurance certificate or policy—Will or declaration under R. S. O. ch. 136, section 5.*—A testator by his will devised an insurance certificate or policy to the defendants as his executors for the benefit of his wife and children:—

Held, that the will was a sufficient declaration under R. S. O. ch. 136, sec. 5, and that creditors were not entitled to the proceeds. *Re Lynn, Lynn v. The Toronto General Trusts Co.*, 475.

INTERPRETATION OF STATUTES.

New rights with specific remedies attached—Remedy confined to those specifically given.—See PROHIBITION, 2.

Matter of procedure—Retroactive interpretation—Amending conviction—53 Vict. c. 37 D. s. 27.]—See INTOXICATING LIQUORS, 4.

INTOXICATING LIQUORS.

1. *Liquor License Act—R. S. O. ch. 194, sec. 70, 105—Minute of conviction—Conviction not in accordance with—Validity.*—A minute of a conviction for selling liquor without a license in contravention of sec. 70, of the Liquor License Act, R. S. O. ch. 194, stated that in default of payment of the fine and costs imposed, the same was to be levied by distress, and in default of distress imprisonment, and a formal conviction was drawn up following the minute:—

Held, that under section 70, distress was not authorized; but that the fact of the minute containing such provision, did not prevent a

conviction omitting such provision, being drawn up and returned, in compliance with a *certiorari* granted.

Regina v. Brady, 12 O. R. 358, and *Regina v. Higgins*, 18 O. R. 148, considered.

Held, also, that the conviction was good under sec. 105 of the said Act. *Regina v. Hartley*, 481.

2. *Taverns and shops—Having liquor for sale in defendant's house, being a house of public entertainment—Conviction not following minute—Sale without license—Druggist—Bias.*—The defendant had been a licensed hotel keeper, his hotel having a bar furnished with a counter and the usual appliances for the sale of liquor, his license having expired. On being asked by a couple of persons for whiskey, he said he could not sell it, and gave them temperance drinks, and on being paid therefor, treated to whiskey, which he obtained from a bottle behind the counter.

The defendant was convicted under section 50, for permitting spirituous liquors to be drunk in his house, being a house of public entertainment, the minute of conviction providing for distress in default of payment of the fine and costs imposed; but the conviction drawn up and returned under a writ *certiorari* omitted the provision for distress. Neither under sections 50 or 70 is distress authorized:—

Held, that the conviction was valid as being in accordance with section 50; and that, under the circumstances, it need not follow the minute.

Regina v. Hartley, ante p. 481, followed.

Held, also that the conviction would have been good under section 70, as the giving and being paid for

the temperance drinks was a mere subterfuge for disposing and selling spirituous liquors; and further, the conviction could be supported under section 105.

Held, also, that the fact of one of the convicting magistrates being a chemist and druggist, and in such capacity filling medical prescriptions containing small quantities of spirituous liquors, did not incapacitate him from acting as a magistrate and adjudicating upon the case. *Regina v. Richardson*, 514.

3. *Liquor License Act—Conviction—Fee for drawing up—Right to charge—Witnesses reading over and signing evidence—Maxim, omnia presumuntur, etc.*—Under the power conferred on justices of the peace by sec. 2 of R. S. O. ch. 74, to order in and by the conviction the payment of reasonable costs, a charge of fifty cents for drawing up a conviction under the Liquor License Act, is authorized.

On motion to quash a conviction, it was objected that the evidence taken before the magistrate and returned by them, was not shewn to have been read over and signed by the witnesses:—

Held, that the maxim *omnia presumuntur esse rite acta* applied, and as the contrary was not shown it would be presumed to have been done. *Regina v. Excell*, 633.

4. *Liquor License Act—Conviction—Absence of distress clause—Amending conviction—Evidence of defendant being licensed—Statement by witnesses unchallenged.*—In a conviction under sec. 73 of the Liquor License Act, R. S. O. ch. 194, for delivering liquor to a person while intoxicated, imprisonment was directed without any provision for

distress. On the conviction being brought before the Court on *certiorari*, the Court under sec. 87 of the Summary Conviction Acts, R. S. C. ch. 178, as amended by sec. 27 of 53 Vict. ch. 37, (D.), amended the conviction by inserting a provision for distress.

The amending Act came into force after the conviction was made and *certiorari* granted, but it being a matter of procedure, the Court had power to act under it and make the amendment.

In proof of defendant being a licensed hotel keeper under the Act, a witness in giving evidence, stated defendant to be such, and although defendant was present and represented by counsel, he allowed the statement to pass unchallenged:—

Held, sufficient, as the witness might have obtained his information from the defendant. *Regina v. Flynn*, 638.

5. *Liquor License Act—Waiver of summons or information—Adjudication—Omission to state amount of costs in—Validity of conviction—Non-statement in conviction that imprisonment was imposed unless costs of conveying to jail sooner paid.*—On the trial of a misdemeanour before magistrates, the taking of an information or issue of a summons may be waived.

On a charge for selling liquor without a license contrary to sec. 70 of R. S. O. ch. 104, the defendant appeared before the magistrates, pleaded to the charge, and the evidence was gone into and the case closed without objection, the defendant convicted, and a fine of \$50 and costs imposed. An objection taken on a motion to quash the conviction that the information was taken before only one justice of the peace,

was overruled, it being, under the circumstances, held to be waived; but, *Seemle*, the information was apparently taken before two justices.

The adjudication did not state the amount of the costs imposed:—

Held, following *Regina v. Flynn*, ante p. 638, this did not invalidate the conviction; but, *Quere*, whether apart from the amending Acts such would be the case.

Under R. S. O. ch. 194, secs. 60, 70, it is not a valid objection to the conviction that it did not state that the imprisonment was for the term specified unless the costs and charges of conveying to jail were sooner paid. *Regina v. Clarke*, 642.

6. “*Liquor License Act*”—*Conviction, form of*—*Summary Convictions Act*—*Enforcement of penalty*—*Witnesses, necessity of evidence being read over and signed*—*Sec. 96, sub-sec. 2, construction of*.]—The defendant holding a shop license was convicted for allowing liquor to be drunk on the premises contrary to section 60 of the “*Liquor License Act*.”

Quere, whether a conviction in such case need do more than impose the penalty and costs and the provisions of the “*Summary Convictions Act*” be called in aid for its enforcement, namely, by the issue of a warrant of distress under sec. 62 in case of nonpayment of the fine due, and in default thereof a warrant under sec. 67 for committal; or whether the forms provided for by sec. 53 must be followed providing for distress and in default imprisonment, unless, etc.; but the question was immaterial, as the Court, as a matter of precaution, amended the conviction so as to include these provisions.

An objection that it did not ap-

pear that the evidence had been read over to the witnesses was overruled following *Regina v. Excell*, ante p. 633.

The direction in sub-sec. 2 of sec. 96, as to the witnesses signing their evidence is not imperative but directory merely. *Regina v. Scott*, 646.

JUDGMENT.

1. *Declaratory*—*Inchoate right to dower*—*Incidental to present relief*—*R. S. O. 1887, ch. 44, sec. 52, sub-sec. 5*.]—Where the sole object of an action was to obtain a declaration that the plaintiff was entitled to an inchoate right of dower in certain lands, all other questions raised in the pleadings having been settled by agreement before trial:—

Held, that, notwithstanding R. S. O. 1887, ch. 44, sec. 52, sub-sec. 5, no such declaration should be made, for it would be solely as to a claim which might or might not be made, under circumstances which might or might not happen, and was not required in any way as incidental to any present relief whatever. *R. S. O. 1887, ch. 44, sec. 52, sub-sec. 5*, was not intended to make any radical change in the rules and practice of the Court. *Bunnell v. Gordon*, 281.

JUSTICE OF THE PEACE.

Liquor License Act—*Conviction*—*Bias*—*Convicting magistrate, a chemist and druggist*.]—*See INTOXICATING LIQUORS, 2.*

Waiver of summons or information—*Validity of conviction*—*Misdemeanour*—*Waiver*.]—*See INTOXICATING LIQUORS, 5.*

LANDLORD AND TENANT.

1. *Covenant to expend manure upon the premises—Manure made after expiry of term—Mesne profits—Claim in former action—Estoppel.*—A lessee covenanted to use upon the demised premises all the straw and dung which should be made thereupon:—

Held, that the lessor was entitled to recover for manure removed from the premises which was there at the expiry of the term, but not for manure made thereafter, while the lessee was overholding.

Hindle v. Pollitt, 6 M. & W. 529, followed.

In a former action of ejectment brought by the plaintiff against the defendants, mesne profits were claimed, but no evidence was given in regard to them:—

Held, that the plaintiff was not estopped from recovering in this action occupation rent for the premises since the expiry of the term. *Elliott v. Elliott et ux.*, 134.

2. *Lease of premises as dwelling and "gents' furnishing store"—Right to have auction sales—Injunction.*—By a lease under seal the defendant rented from the plaintiff certain premises for three months. The lease contained a covenant that the lessee was not to use the premises for any purpose but that of a private dwelling and "gents' furnishing store."—

Held, that the carrying on by the lessee of auction sales of his stock, on the premises, was a breach of the covenant restrainable by injunction. *Cockburn v. Quinn*, 519.

LIBEL AND SLANDER.

See DEFAMATION.

LIMITATION OF ACTIONS.

1. *Partition—Tenants in common—Discontinuance by one and possession by the other.*—Where by mutual arrangement between the plaintiff and his brother, two tenants in common of certain land sought to be partitioned in this action, the former discontinued possession, and the latter retained exclusive possession thereof, making extensive improvements and receiving the rents and profits for the statutory period of limitation, and the plaintiff removed to another lot, which they also held as tenants in common, he also retaining the possession, etc., thereof for the statutory period, the only apparent dispute between the parties being a claim which had been made by the plaintiff that it was agreed that an alleged excess in value of the lot taken by his brother should be accounted for:—

Held, that the action could not be maintained, as a good title to the lot had been acquired under the Statute of Limitations, and that the evidence failed to establish the agreement to pay the alleged value; the remedy for which in any event was also barred. *Haig v. Haig*, 61.

2. *Surrogate guardian—Infant—Power to lease lands of—Possession before and after majority of infant.*—A guardian of an infant appointed under the Surrogate Court Act, R. S. O. ch. 137, has power to lease the lands of the infant during the latter's minority, but not beyond that period.

Switzer v. McMillan, 23 Gr. 538, not followed.

Decision of ARMOUR, C.J., affirmed on this point.

During such minority the guardian is a trustee of the lands for the infant

and cannot acquire a title to them by possession, but after the majority of the infant the possession of the guardian changes its character and becomes that of a stranger, and the Statute of Limitations runs in favour of the guardian or those claiming under him.

Hickey v. Stover, 11 O. R. 106, followed.

Decision of ARMOUR, C.J., reversed on this point. *Clarke v. Macdonell*, 564.

Infants—Possession by husband after wife's death of her separate property.—See HUSBAND AND WIFE, 1.

Devise of land by wife to infant children—Possession by husband—Natural guardian.—See HUSBAND AND WIFE, 3.

Crown lands—Locatee receipt—Fraudulent locatee—Delay in adjudication by department.—See CROWN LANDS, 1.

Tenants in common—Discontinuance by one and possession by the other.—See LIMITATION OF ACTIONS, 1.

Easement—Prescriptive rights—Access to springs—R. S. O. ch. 111, secs. 35, 37.—See EASEMENT, 2.

LIQUOR LICENSE ACT.

See INTOXICATING LIQUORS, 1, 3, 4, 5, 6.

LOCAL IMPROVEMENT RATES.

Contract of sale—Incumbrances—Vendor and purchaser.—See SALE OF LAND, 1.

LOCATEE RECEIPT.

Fraudulent locatee—Statute of Limitations—R. S. O. 1887, ch. 24, sec. 16.—See CROWN LANDS, 1.

LOCUS STANDI.

Voluntary conveyance—Fraudulent preference—Plaintiff a creditor to amount under \$40.—See FRAUDULENT CONVEYANCE, 1.

Parties—Seduction—Mother as plaintiff in absence of the father from the Province—Common law right of action.—See SEDUCTION, 1.

MARRIAGE.

Evidence of lawful marriage—Declarations of deceased husband as to—Indian marriage.—See HUSBAND AND WIFE, 4.

MASTER AND SERVANT.

1. *Workmen's Compensation for Injuries Act—Factories Act—Negligence—Contributory negligence—R. S. O. 1887, ch. 141; ib. ch. 208.*—The plaintiff was employed by a sub-contractor to do work upon lumber after it had left the defendants' saw-mill, and before it was shipped. To get some fresher water to drink than that supplied by the sub-contractor, the plaintiff went through the saw-mill (in which he had no business in connection with his work), and in returning, going out of his way through the mill, to assist a workman who was in difficulty with some planks, he fell into an unguarded hole in which a saw was working and was injured:—

Held, that under these circumstances, the plaintiff could have no claim against the defendants, either under the Ontario Factories Act, R. S. O. 1887, ch. 208, or the Workmen's Compensation for Injuries Act, *ib.* ch. 141.

Even though the plaintiff might be a person in the service and employment of the defendants within the meaning of the Ontario Factories Act, as amended, yet the duties prescribed by that Act can be enforced only by penalty; no civil liability is imposed on the owner of the factory if, apart from the statute, he would not have been liable at common law, except that the Act may be used for evidential purposes in regard to the place of the accident being dangerous, and requiring protection (as *e. g.* *per* FERGUSON, J., sec. 15 shews the hole in this case to have been). But here the defendants would not be so liable on account of the contributory negligence of the plaintiff. *Finlay v. Miscampbell*, 29.

MECHANICS' LIEN.

1. *Material men—Time for registering claim—R. S. O. ch. 126, sec. 21.*—Merchants supplied materials to the contractor for certain buildings and claimed a lien under the Mechanics' Lien Act in respect thereof. There was no contract for the placing of these materials upon the property; the last of them were bought by the contractor from the merchants on the 22nd November, and were by him placed in the building on the 23rd November:—

Held, that the time for registering the claim of lien, under sec. 21 of the Act, R. S. O. ch. 126, began to run from the 22nd November. *Hall et al. v. Hogg et al.*, 13.

2. *Ascertainment of amount due to contractor—Parties—Registered owner not liable on contract—Work and labour—Acceptance of bad work—Congregation occupying church—Reduction of price for bad work—Measure of—Extras—Written order for.*—In an action to enforce a mechanics' lien, brought by material men against the contractor and the registered owner, the contest was as to whether anything was due to the contractor, the registered owner not being liable on the contract:—

Held, that the amount due to the contractor could not be ascertained without the persons liable on the contract being brought before the Court.

The work in question was the building of a church. The last of the work done was the pews, and as they were being put in objection was made by the architect to their material and workmanship:—

Held, that the occupying of the church with the pews objected to in it was not an acceptance of the work:—

Held, also, that a reduction of the contract price by an amount equal to the difference in value between the bad material and that which should have been used was not an adequate measure of the set-off to which the proprietors were entitled.

The contract provided that no extras were to be allowed unless expressly ordered, and payments for the same expressly agreed for in writing by the proprietors or architects:—

Held, that extras could not be allowed unless a writing was proved. *Wood et al. v. Stringer et al.*, 148.

3. *Act for simplifying procedure—High Court and inferior Courts—Application of Act—53 Vict. ch. 37,*

(O.)]—*Held*, that notwithstanding the apparently unlimited provisions of sec. 1, of 53 Vict. ch. 37 (O.), entitled an “Act to simplify the Procedure for enforcing Mechanics’ Liens,” the intention of the Act is to simplify such procedure in the High Court only, leaving the procedure provided for in County Courts and Division Courts unaffected by the passing of the Act. *Secord v. Trumm*, 174.

4. *Partnership — Claim of lien registered in name of, after dissolution*—R. S. O. ch. 126, secs. 16, 19—“*Claimant*”—“*Person entitled to the lien*”—53 Vict. ch. 37 (O.)—*Jurisdiction of High Court*—*Joining liens*—*Statement of claim under 53 Vict. ch. 37, sec. 2 (O.)—Amendment.*]—A claim of lien under the Mechanics’ Lien Act was registered and proceedings to enforce it were taken in the name of a firm which had been dissolved, and one of the members of which had died prior to the registration. The materials for which the lien was claimed were, however, all furnished by the firm before the dissolution or death, and it was provided that the dissolution was not to affect this and other engagements.

Sec. 16 of R. S. O. ch. 126, under which the lien was registered, speaks of the “claimant” of the lien, and sec. 19 of the “person entitled to the lien.” The Interpretation Act, R. S. O. ch. 1, sec. 8 (13), shews what the word “person” shall include, and does not mention a “firm” or “partnership.”—

Held, that the lien attached on the land, and was validly continued; the difficulty as to the word “person” was overcome by the use of the alternative word “claimant,” which extended to a partnership using the firm name in the registration of the lien.

Under the “Act to simplify the Procedure for enforcing Mechanics’ Liens,” 53 Vict. ch. 27, it is competent to join liens so as to give jurisdiction to the High Court, though each apart may be within the competence of an inferior Court.

The plaintiffs in proceeding under 53 Vict. ch. 37 to enforce their lien filed with a master as the “statement of claim” mentioned in sec. 2, a copy of the claim of lien and affidavit registered, verified by an affidavit, and the master thereupon issued his certificate:—

Held, that if the “statement of claim” filed was not in proper form, inasmuch as it contained all the facts required for compliance with the Act, an amendment *nunc pro tunc* could be allowed. *R. Bickerton & Co. v. Dakin—Biggins, Clarkson & Co. v. Dakin*, 192; in appeal, 695.

MISTAKE.

1. *Money paid by mistake—Will—Overpayment of interest on legacy—Recovery back—Interest on overpayments—Account.*]—Where a testator bequeathed a legacy to be paid by the devisee of certain lands through the executor in twenty semi-annual instalments, with interest at the rate of six per cent, payable at the time of each instalment on the amount of such payment to be computed from the time of his decease; and by mutual error, interest was paid with each instalment upon the whole amount of principal then remaining unpaid, which payments of interest were consumed by the legatee as income, while he invested the instalments of principal, and the legatee now brought this action against the executor and devisee claiming an instalment as still due,

the defendants alleging that he had been overpaid, and asking an account:

Held, by MEREDITH, J., that the overpayments of interest were made under mistake of fact, and could be recovered or set off: and that the plaintiff, by reason of the overpayments, was enabled to, and did, invest just so much of the *corpus*, at interest, and so in effect, got, and should be charged with interest upon the overpayments: and it being admitted that upon this footing the plaintiff was fully paid, dismissed the action:—

Held, by the Divisional Court, affirming that judgment: that the overpayments were made under a mistake of fact and might be recovered or set off; but varying it: that an account should be taken, and that all the payments made should be brought into account and applied, but without addition of interest, to the aggregate of the amounts properly due and payable under the will, and any balance due to plaintiff ascertained.

Corham v. Kingston, 17 O. R. 432, and the *United States v. Sanborn*, 135 U. S. R. 271, specially referred to. *Barber v. Clark*, 522.

MORTGAGE.

1. *Sale under power—Notice of sale—Demand of payment within a month—Advertising sale during the month—Injunction—R. S. O. ch. 102, sec. 30.*—An advertisement for sale of lands is a "proceeding" within the meaning of the words "no further proceedings" in sec. 30 of R. S. O. ch. 102.

Where a mortgagee served upon the mortgagor a notice demanding payment of the mortgage money, and stating that unless payment

were made within a month from the service, the mortgagee would proceed to sell, an injunction was granted restraining the mortgagee from publishing, until after the expiry of the month, an advertisement of the sale of the mortgaged premises. *Smith v. Brown et al.*, 165.

2. *Power of sale—Notice of sale—Execution creditor.*—In taking proceedings under a power of sale in a mortgage drawn under the "Short Forms Act," execution creditors of the mortgagor come within the scope of the word "assigns," and as such are entitled to notice under power of sale, but only those having executions in the sheriff's hands at the time notice of default is given need be served. *Re Abbott v. Medcalf*, 299.

Execution creditor—Purchase of mortgage by—Denial of mortgagor's title.—See ESTOPPEL, 1.

MUNICIPAL CORPORATIONS.

1. *By-law as to payment of water rates—Discount to consumers—Exemption as to government institutions—Taxes—Discrimination.*—A by-law of the defendants relating to the payment of rates for water supplied by the defendants to buildings in the municipality, provided that the rates should be subjected to a reduction of fifty per cent. if paid within a certain time, "save and except in the cases of government and other institutions which are exempt from city taxes, in which cases the said provisions as to discount shall not apply."

Held, that the post-office, customs-house and other buildings vested in the Crown, all of which were exempt

from city taxes, were "government institutions," within the meaning of the by-law.

2. Having regard to 35 Vict. ch. 79, sec. 12 (O.); 41 Vict. ch. 41, sec. 3, (O.); R. S. O. ch. 192, secs. 19 and 28, that the moneys charged and paid as water rates or rent for water were not taxes, but the price or prices paid for water upon a sale thereof to the consumers.

3. That the by-law was not invalid as discriminating against the Crown. *Attorney-General for Canada v. City of Toronto*, 19.

2. *Action of negligence—Adding third party as defendant under R. S. O. 1887, ch. 184, sec. 531, sub-sec. 4—Proper order of addressing the jury.*—An action for damages for injuries resulting from a defective sidewalk was brought against a city, who under R. S. O. 1887, ch. 184, sec. 531, sub-sec. 4, obtained an order adding O. as a party defendant, and alleged in their defence that O. was responsible for the defects in the sidewalk, and asked a remedy over against him. O. delivered a defence deny the cause of action, and alleging that if any accident occurred, it was through the neglect of the city. At the trial the jury found that O. occasioned the accident, and gave damages to the plaintiff. The plaintiffs then applied for leave to amend their statement of claim by claiming directly against O., which leave was granted, and judgment was entered against O., for the damages awarded:—

Held, affirming the decision of MACMAHON, J., that the leave to amend was properly granted, and the judgment should be affirmed.

Per BOYD, C. Modern procedure endeavours to work out the rights

and liabilities of all parties as far as possible in the same action, and so long as no substantial injustice is done it is permissible to conform the pleadings to the facts at the close of the case.

At the trial the Judge ruled that counsel for O. should address the jury before the counsel for the city, thus giving the latter the reply as against O.:—

Held, that this ruling was correct.

Per ROBERTSON, J., As regards the city and O., the former stood in the relation of plaintiff, and under these circumstances, evidence having been given by O., to shew that the injury complained of was not caused by his negligence, but by the negligence of the city, the latter had the right to address the jury in reply. *Stilliway v. City of Toronto*, 98.

3. *Way—Road washed away by water of lake—Duty to repair—Difference between reparation and restoration.*—Where in an action brought to compel a municipal corporation to repair a portion of a road which ran along the shore of a lake, it appeared that the road had been completely submerged by the water, so that restoration would be necessary, and no ordinary reparation could suffice:—

Held, that the defendants were not required by law to do the work. *McCormick v. Corporation of Pelde*, 288.

4. *Executory contract for purchase of fire-engine—Necessity for by-law—Contract under seal—Acceptance of bill of exchange for price—R. S. O. 1887, ch. 184, secs. 480, 630—52 Vict. ch. 36, secs. 20, 40.*—A contract for the purchase of a steam fire-engine which remains executory in the sense that no acceptance of

the engine has taken place, cannot be enforced against a municipal corporation unless a by-law authorizing the purchase has been passed, under the Municipal Act, R. S. O. 1887, ch. 184, secs. 480, 630, as amended by 52 Vict. ch. 36, secs. 20, 40, even although the contract to purchase is under the corporate seal and a bill of exchange for the price has been accepted by the mayor.

Decision of ROSE, J., affirmed. *Waterous Engine Works Co. v. Corporation of Town of Palmerston*, 411.

5. *Medical health officer—Liability of city for acts of—Master and servant.*—*Held*, that the medical health officer of a municipal corporation appointed under R. S. O. ch. 205, sec. 47, is not a servant of the corporation so as to make them liable for his acts done in pursuance of his statutory duties. *Forsyth v. Canniff and the Corporation of the City of Toronto*, 478.

6. *Local improvements—Necessity for by-law—Indefiniteness of resolution.*—The council of a city by a resolution confirming the report of the Committee on Works, authorized the corporation to enter into an agreement with certain railway companies—who were liable to maintain and keep in repair the existing bridges over their tracks on a certain street—whereby the corporation were to build as a local improvement two new bridges over said tracks at an approximate cost of \$75,000, \$20,000 thereof to be paid by the railway companies in full of all liability, \$30,000 by the corporation as their respective shares, and \$25,000, the estimated damage to lands, to be assessed against the properties fronting on the street. No provision was made in the estimates for the current

year for the payment by the corporation of the amount to be paid by them:—

Held, that before the expenditure could be brought within the local improvement clauses of the Municipal Act, a special by-law must be passed fixing the amount or proportion of the cost of the work to be assumed by the city and to be assessed on the locality, and declaring the opinion of the council to be that the work was necessary, and that it would be inequitable to charge the whole cost of it upon the locality; and that the fact of there being a general by-law passed under sec. 612, sub-sec. 1 (a), for determining property to be benefited by a proposed local improvement was not sufficient: but, even if a by-law were unnecessary, the resolution was too indefinite, as it could not be gathered with certainty therefrom what proportion of the cost was to be imposed on the property to be locally assessed.

An interim injunction was granted restraining the corporation from acting under the agreement. *Fleming v. The Corporation of the City of Toronto*, 547.

Collector of taxes—Official bond—Release of sureties—Non-disclosure—Constructive fraud. See PRINCIPAL AND SURETY 2.

NEW TRIAL.

Defamation—Finding of jury of, no damage; but no finding as to the slander—Jury. See DEFAMATION, 2.

OFFICIAL BOND.

Municipal corporation—Release of sureties—Non-disclosure. See PRINCIPAL AND SURETY, 2.

ONTARIO FACTORIES ACT.

See MASTER AND SERVANT, 1.

PARTIES.

Seduction—Mother as plaintiff in absence of the father from the province—Common law right of action.—*See* SEDUCTION, 1.

PRACTICE.

Reply, right to—Proper order of addressing jury—Third party.—*See* MUNICIPAL CORPORATIONS, 2.

Third party under R. S. O. 1887, c. 184, s. 531, sub-sec. 4.—*See* MUNICIPAL CORPORATIONS, 2.

Amendment in statement of claim after trial.—*See* MUNICIPAL CORPORATIONS, 2.

Amendment—Of statement of claim under 53 Vict. c. 37, sec. 2.—*See* MECHANICS LIEN, 3.

PRINCIPAL AND AGENT.

Authority of ticket agent—*See* RAILWAYS AND RAILWAY COMPANIES, 1.

PRINCIPAL AND SURETY.

1. *Bond of indemnity—Actual damage—Judgment recovered against obligee but not paid—Indemnity—Dissolution of partnership—Payment into Court.*—The defendants, husband and wife, executed in favour of the plaintiff, the husband's retiring partner, a bond conditioned to be void if the husband should ~~save~~, defend and keep harmless and

fully indemnify the plaintiff from all loss, costs, charges, and damages, and expenses which he might at any time sustain, or suffer, or be put to for or by reason of non-payment by the husband of the liabilities of the firm as the same became due, it being the intention and the plaintiff was thereby "indemnified or intended so to be from all and every liability of every nature and kind soever of the said firm."

Judgments were recovered by creditors of the firm against them and the plaintiff now sued the defendants to recover the amount to pay these judgments, although he had not himself paid them:—

Held, that he was entitled to have the judgments and costs paid and the amounts necessary were for that purpose ordered to be paid into Court by the defendants.

Decision of ARMOUR, C. J., reversed. *Boyd v. Robinson*, 404.

2. *Official bond—Collector of taxes—Municipal corporations—Release of sureties—Non-disclosure—Constructive fraud.*—In an action by a municipal corporation against the sureties to the bonds of a defaulting collector of taxes, for the due performance of his duties for 1886 and 1887, it appeared that there had been great laxity on the plaintiff's part, but that shortly before the collector absconded, in 1888, a majority of the members of the corporation had confidence in his honesty; while the defendants had not sought information from the plaintiffs as to the way he had performed his duties in former years:

Held, that the non-disclosure by the plaintiffs to the defendants of a motion having been made in council in 1885 that if the roll for 1884 was not returned by the next

meeting, an enquiry before the County Court Judge would be asked for; or of a resolution in August, 1885, instructing the treasurer to take proceedings against the collector and his sureties for the balance due on the 1884 roll unless fully settled before September 10th, next, which it was; or of another like resolution in 1886, in reference to the taxes of 1885, which were afterwards, in 1888, paid over in full by him, and of the non-return by him of the 1885 roll until 1888, were not such non-disclosures as amounted to constructive fraud, on the plaintiffs' part sufficient to relieve the defendants from liability on their bonds.

Corporation of the Township of Adjala v. McElroy, 9 O. R., 580, specially considered.

Decision of MACMAHON, J., 20 O. R. 42 affirmed. *Corporation of Town of Meaford v. Lang et al.*, 42, 541.

Bond for performance of duties of registrars—Payment of proportion of fees to municipality—Liability of sureties—R. S. O. c. 114, s. 107. See REGISTRY LAWS, 1.

PRIVATE INTERNATIONAL LAW.

Chattel mortgage—Foreign contract as to chattels in Ontario.—See **BILLS OF SALE AND CHATTEL MORTGAGE, 1.**

PROHIBITION.

1. *Division Court—Order of Judge setting aside attachment—R. S. O. ch. 51, sec. 262.*—Power over the process of his own Court is in-

herent in the Judge of a Division Court as well as of other Courts; and, notwithstanding the provisions of sec. 262 of the Division Courts Act, R. S. O. ch. 51, a Judge may set aside an attachment which has been improperly issued. *Re Mitchell v. Scribner*, 17.

2. *Division Court—Erroneous interpretation of statute—Husband and wife—Magistrate's order for payment of maintenance money under 51 Vict., ch. 23, sec. 2 (O.).—Action to recover arrears.*—Where new rights are given by a statute with specific remedies for their enforcement, the remedy is confined to those specifically given.

And where a wife obtained a magistrate's order under 51 Vict. ch. 23, sec. 2, (O.), for payment by her husband of a weekly sum for her support:—

Held, that her remedies were limited to those given by the statute, and that an action in the Division Court for arrears of payments under the order could not be maintained against the husband.

The facts not being in dispute, prohibition to the Division Court was granted on the ground that the Judge in that Court had given an erroneous interpretation to the Act referred to in holding that the magistrate's order was equivalent to the final judgment of a court and that an action upon it would lie. *Re Sims et al. v. Kelly*, 291.

3. *Division Court—Garnishee suit—Money handed by prisoner to constable—Question of fact.*—The defendant was arrested, and when taken to the police station handed over the money in his possession to a constable. Creditors of the defendant sought to garnish this money

by Division Court suits. The Judge in the Division Court found that the money was handed over voluntarily and held that it could be garnished :

Held, that the question whether the garnishee was indebted to the defendant was a question of fact within the jurisdiction of the inferior Court, and that prohibition would not lie. *Re Field v. Rice, Vaughan, Garnishee ; Re Ford v. Rice, Vaughan, Garnishee*, 309.

PUBLIC SCHOOLS.

1. *Protestant separate school—Invalid extension of boundaries of school section.*—The boundary of a Protestant separate school section cannot be extended into or over an adjoining, public school section, where the teacher in the latter is not a Roman Catholic. *Banks et al. v. The Corporation of the Township of Anderson et al.*, 296.

RAILWAYS AND RAILWAY COMPANIES.

1. *Contract—Passenger ticket—"Via direct line"—Authority of ticket agent—Meaningless condition.*—When a railway company intrust an agent with the sale of their tickets, they clothe him with the apparent authority to explain to the purchasers of such tickets the purport or effect of any condition or provision thereon, which would be unintelligible without such explanation, and also their rights under such tickets, having regard to such provision or condition.

And where such an agent sold a ticket "via direct line" between two places, and there were three different

routes between the places operated by the company, none of them being direct, and one of which was shorter than the others, and the agent in selling the ticket gave the purchaser to understand that he might travel under the ticket by any one of the three lines, and in doing so by one of the longer routes, he was forcibly ejected from the train for declining to pay an extra fare :—

Held, that the provision "via direct line" was unintelligible with out explanation and that the company were bound by the representation of their agent in relation thereto :—

Held, also, that the words "via direct line" were inapplicable to the contract and must be struck out in construing it. *Dancey v. Grand Trunk R. W. Co.*, 603.

RECEIVER.

Appointed to supersede bankrupt and intemperate execution.—See EXECUTORS AND ADMINISTRATORS, 1.

REGISTRY LAWS.

1. *Principal and surety—Duties of registrars—Bond for performance of—Payment of proportion of fees to municipality—Liability of sureties—R. S. O. ch. 114, sec. 107.*—*Held*, that the sureties to a bond, dated 8th January, 1886, given in accordance with Schedule A of the Registry Act, R. S. O. ch. 114, for the performance of the duties, etc., of the registrar, being the form of bond prescribed by the Act in force prior to the introduction of the provisions giving the municipalities a share in the fees, were not liable for the non-payment over of such share.

Decision of STREET, J., 19 O. R. 349, affirmed. *The Corporation of the County of Middlesex v. Smellman*, 487.

Redemption decree—Notice—Deed absolute in form really a mortgage.] See EASEMENT, 2.

Severance of tenement by conveyance—Express grant of easement—Notice.]—See EASEMENT, 1.

SALE OF GOODS.

1. *Implied warranty of title—Failure of consideration—Bill of lading—Transfer of interest under—Absolute sale by pledgees—Findings of jury—Inconsistency—Duty of trial Judge—R. S. C. ch. 120.*]—The plaintiffs sued a bank to recover the price paid the bank for certain goods which, owing to a customs seizure and forfeiture, the plaintiffs never received.

The bank was never in actual possession of the goods, but a bill of lading was indorsed to them as a security for advances, and this bill of lading was indorsed and delivered by the bank directly to the plaintiffs.

The jury found that it was the bank which sold the goods to the plaintiffs; that they professed to sell with a good title; that they had not a good title; and that the plaintiffs could not by any diligence have obtained the goods:—

Held, that upon these findings and the evidence, and having regard to the provisions of the Bank Act, R. S. C. ch. 120, the transaction must be regarded as a sale by the bank as pledgees with the concurrence of the pledgor, and not as a mere transfer of the interest of the bank under the bill of lading; and

that the plaintiffs were entitled to recover the price as upon an implied warranty of title and a failure of consideration.

Morley v. Attenborough, 3 Ex. 500, commented on and distinguished.

Held, also, per ROBERTSON, J., that the trial Judge was within his right and duty in sending the jury back to reconsider their findings after pointing out their inconsistency. *Peuchen et al. v. Imperial Bank et al.*, 325.

SALE OF LAND.

1. *Contract of sale—Incumbrances—Local improvement rates—Apportioning taxes—Vendor and purchaser.*]—In a contract for sale and exchange of certain lands free from incumbrances it was provided that “unearned fire insurance premium, interest, taxes, and rental” should be “proportioned and allowed to date of completion of sale”:—

Held, notwithstanding that special frontage rates imposed for local improvements and construction of sewers by by-laws passed prior to the contract, the period for payment of which had not expired, were incumbrances to be discharged by the vendors respectively:—

Held, also, that the vendors were likewise bound to discharge a special frontage rate imposed by a by-law passed subsequently both to the date of the contract and the date fixed for the completion of the sale, inasmuch as the work was actually done and the expenditure actually made before the contract, the council having first done the work and then passed the by-law to pay for it, under 53 Vict. ch. 50, sec. 38 (O). The substantial charge as a whole

came into existence upon the finishing of the work.

Cumberland v. Kearns, 18 O. R. 151, 17 A. R. 281, commented on and distinguished. *Re Graydon and Hammill*, 199.

Crown patent — Construction — Land described as "north part" of lot — Uncertainty.] — See CROWN LANDS, 2.

See HUSBAND AND WIFE, 1, 2, 3, 5.

SEDUCTION.

1. *Mother of plaintiff in absence of the father from the Province — Locus standi — Common law right of action — Demurrer — R. S. O. 1887, — ch. 58.*] — Held, on demurrer to a statement of claim in an action of seduction that the mother of the girl seduced, suing as her mistress, had a sufficient common law right to bring the action, in the absence from the Province of the girl's father.

Held, also, that R. S. O. 1887, ch. 58, "An Act respecting the Action of Seduction," is only an enabling Act enlarging the right to maintain the action, under circumstances which would not be sufficient at common law. *Gould v. Erskine*, 347.

SESSIONS.

1. *Conviction — Appeal to Sessions — Dismissal of appeal with costs — Certiorari — Right to — Witness fees — Power to allow — Defendant — Admissibility of evidence of.*] — Where an appeal to the Sessions is dismissed without being heard and determined on the merits there is no power to impose costs.

Re Madden, 31 U. C. R. 333, followed.

When a notice of appeal is given for the wrong sessions, and the appeal is not heard on the merits, the right to *certiorari* is not taken away by sec. 84, R. S. C. ch. 178.

Section 58 of the same Act authorizes justices of the peace to allow witness fees.

On appeal to the Divisional Court, a conviction for unlawfully and maliciously pointing a loaded firearm at a person, was quashed on an objection taken for the first time, that the defendant who was called as a witness at the trial, was not a competent or compellable witness.

Regina v. Hart, ante, p. 611, followed. *Regina v. Becker*, 676.

SOLICITOR.

1. *Solicitor's lien — Costs of actions to restrain sale of estate — Lien upon estate in hands of assignee — Absence of fund upon which lien could attach — Costs.*] — Two actions were brought by a trader, to restrain proceedings under a chattel mortgage against the trader's stock of goods, and interlocutory injunctions were granted, but the actions were not carried further. The chattel mortgagee brought an action to recover the mortgage money and to restrain the mortgagor from selling the goods, whereupon the latter made an assignment for creditors, and, by arrangement in that action, the goods were sold by the assignee, and payment was made in full to the mortgagee for debt, interest, and costs of that action, after notice and without objection on the part of any of the creditors or of the solicitor who conducted the actions brought by the trader.

The solicitor claimed that by his exertions in these actions he had saved the goods from being sacrificed by summary sale, and brought this action to have it declared that he was entitled to a preferential lien for costs upon the estate in the hands of the assignee:—

Held, that, even if it were shewn that stopping the sale under the mortgage were a benefit to the estate there was no jurisdiction, without the direction of a statute, to charge the property recovered or preserved, and without a money fund there was no subject for a lien.

Costs as of a successful demurrer only were allowed to the defendant. *Tremear v. Lawrence*, 137.

2. *Action brought without proper authority—Costs ordered to be paid by solicitor*—An action, brought by solicitors in the plaintiff's name, was dismissed with costs, and judgment entered against the plaintiff. The solicitors had acted without any written retainer from the plaintiff, or any instructions from her personally, relying on instructions received from plaintiff's husband, which she positively denied ever having given, and also on letters written to her, the sending of which was not strictly proved, and which she denied ever having received.

On a motion made therefor by the plaintiff the judgment and all subsequent proceedings were set aside, and the solicitor ordered to pay the plaintiff's costs as between solicitor and client, and the defendant's costs as between party and party. *Scribner v. Parcells et al.*, 554.

SPECIFIC PERFORMANCE.

1. *Exchange—Time of the essence—Date of performance on Sunday.*—

In an action for specific performance, even when time is of the essence of the agreement, if the party in default has done what in him lay to perform the contract, the Court may, in the exercise of its discretion, grant the relief claimed.

And where, by such agreement, the conveyance was to be tendered by the plaintiff to the defendant and the transaction closed on the "first day of June" which fell on Sunday, when no tender was made, and the conduct of the defendant on the following day was such as to exclude a tender on that day, in an action for specific performance the plaintiff was held entitled to judgment. *Cudney v. Gives*, 500.

STATUTES.

13 Eliz. ch. 5, sec. 3.]—*See FRAUDULENT TRANSFER OF GOODS*, 1.

9 Geo. II. ch. 5.]—*See CRIMINAL LAW*, 4.

35 Vict. ch. 79, sec. 12 (O.)]—*See MUNICIPAL CORPORATIONS*, 1.

41 Vict. ch. 41, sec. 3 (O.)]—*See MUNICIPAL CORPORATIONS*, 1.

R. S. C. ch. 120.]—*See SALE OF GOODS*, 1.

R. S. C. ch. 129.]—*See INJUNCTION*, 1.

R. S. C. ch. 173, sec. 3.]—*See CRIMINAL LAW*, 3.

R. S. C. ch. 173, sec. 28.]—*See FRAUDULENT TRANSFER OF GOODS*, 1.

R. S. C. ch. 174, sec. 259.]—*See CRIMINAL LAW*, 5.

R. S. C. ch. 178, secs. 58, 84.]—*See SESSIONS*, 1.

R. S. C. ch. 178, sec. 87.]—*See INTOXICATING LIQUORS*, 4.

R. S. C. ch. 178, sec. 96, sub-sec. 2.]—*See* INTOXICATING LIQUORS, 6.

R. S. O. ch. 24, sec. 16.]—*See* CROWN LANDS, 1.

R. S. O. ch. 44, sec. 52, sub-sec. 5.]—*See* JUDGMENT, 1.

R. S. O. ch. 51, sec. 262.]—*See* PROHIBITION, 1.

R. S. O. ch. 58.]—*See* SEDUCTION, 1.

R. S. O. ch. 61, sec. 9.]—*See* EVIDENCE, 1.

R. S. O. ch. 74, sec. 2.]—*See* INTOXICATING LIQUORS, 3.

R. S. O. ch. 102, s. 30.]—*See* MORTGAGE, 1.

R. S. O. ch. 111, secs. 35, 37.]—*See* EASEMENT, 2.

R. S. O. 1887, ch. 111, sec. 43.]—*See* HUSBAND AND WIFE, 1.

R. S. O. ch. 114, sec. 107.]—*See* REGISTRY LAWS, 1.

R. S. O. ch. 124, sec. 2.]—*See* FRAUDULENT CONVEYANCE, 2.

R. S. O. ch. 124, sec. 9.]—*See* ASSIGNMENTS AND PREFERENCES, 1.

R. S. O. ch. 125, sec. 3.]—*See* HUSBAND AND WIFE, 5.

R. S. O. ch. 125, secs. 4, 6.]—*See* BILLS OF SALE AND CHATTEL MORTGAGES, 2, 3.

R. S. O. ch. 126, secs. 16, 19.]—*See* MECHANICS' LIEN, 4.

R. S. O. ch. 126, sec. 21.]—*See* MECHANICS' LIEN, 1.

R. S. O. ch. 132, sec. 4, sub-sec. 5, sec. 7.]—*See* HUSBAND AND WIFE, 5.

R. S. O. ch. 134, sec. 3.]—*See* HUSBAND AND WIFE, 5.

R. S. O. ch. 136, secs. 5, 11.]—*See* INSURANCE, 3, 4.

R. S. O. ch. 141.]—*See* MASTER AND SERVANT, 1.

R. S. O. ch. 157.—*See* COMPANY, 2.

R. S. O. ch. 157, sec. 45.]—*See* COMPANY, 3.

R. S. O. ch. 184, sec. 389.]—*See* WATER AND WATERCOURSES, 1.

R. S. O. ch. 184, secs. 480, 630.]—*See* MUNICIPAL CORPORATIONS, 4.

R. S. O. ch. 184, sec. 531, sub-sec. 4.]—*See* MUNICIPAL CORPORATIONS, 2.

R. S. O. ch. 184, sec. 590.]—*See* WATER AND WATERCOURSES, 1.

R. S. O. ch. 184, sec. 612, sub-sec. 1 (a).]—*See* MUNICIPAL CORPORATIONS, 6.

R. S. O. ch. 192, secs. 19, 28.]—*See* MUNICIPAL CORPORATIONS, 1.

R. S. O. ch. 193, sec. 191.]—*See* CROWN LANDS, 2.

R. S. O. ch. 194, secs. 50, 60, 70, 105.]—*See* INTOXICATING LIQUORS, 1, 2, 5.

R. S. O. ch. 194, sec. 73.]—*See* INTOXICATING LIQUORS, 4.

R. S. O. ch. 194, sec. 105.]—*See* INTOXICATING LIQUORS, 1.

R. S. O. ch. 205, sec. 47.]—*See* MUNICIPAL CORPORATIONS, 5.

R. S. O. ch. 208.]—*See* MASTER AND SERVANT, 1.

47 Vict. ch. 19, secs. 5, 22, (O).]—*See* HUSBAND AND WIFE, 5.

51 Vict. ch. 5 (O).]—*See* CONSTITUTIONAL LAW, 1.

51 Vict. ch. 19 (O).]—*See* CONDITIONAL SALE, 1.

51 Vict. ch. 23, sec. 2 (O).]—*See* PROHIBITION, 2.

52 Vict. ch. 13, secs. 2, 3, 4, 6 (O).]—*See* ARBITRATION AND AWARD, 1.

52 Vict. ch. 36, secs. 20, 40 (O).]—*See* MUNICIPAL CORPORATIONS, 4.

53 Vict. ch. 27 (O).]—*See* MECHANICS' LIEN, 3.

53 Vict. ch. 37, sec. 27 (D.)—*See* INTOXICATING LIQUORS, 4.

53 Vict. ch. 37, sec. 1 (O.)—*See* MECHANICS' LIEN, 3.

53 Vict. ch. 50, sec. 38 (O.)—*See* SALE OF LAND, 1.

SURROGATE GUARDIAN.

Power to lease lands—Possession of lands by.—*See* LIMITATIONS OF ACTIONS, 2.

TAX SALE.

Crown patent—Tax sale—Adverse occupation—R. S. O. c. 193, s. 191.—*See* CROWN LANDS, 2.

TORT.

By married woman—Action against husband.—*See* HUSBAND AND WIFE, 6.

TRUSTS AND TRUSTEES.

1. *Joint character of executors and trustees—Taking securities in name of one of two joint executors and trustees, as trustee—Termination of executorship—Pledging securities for advance—Misapplication of moneys advanced—Breaches of trust—Notice to pledgees—Following securities—Burden of proof—Infant executor—Judgment against defaulting trustee.*—A sole executor or the surviving executors of a deceased person may, at any time within twenty years from the death of the testator, sell or pledge any of the estate to any purchaser or mortgagee who has no notice of a breach of trust, and the

purchaser or mortgagee is under no obligation to make inquiry as to the destination of the purchase or mortgage money or to see to its application; but with regard to trustees there is no rule which entitles a person advancing money to them to disregard the notice which is found in the mere description of trustee, that the person to whom it is applied is not absolute owner of the security which he proposes to pledge.

By a will two persons were appointed executors and trustees, one of the trusts being to invest the moneys of the estate; both proved the will, though one was at the time an infant; the other invested certain moneys of the estate in mortgages, which were made to himself alone "as trustee of the estate and effects of J. C. deceased:" and ten years after the testator's death he hypothecated these mortgages to the defendants for advances, which he misapplied:—

Held, that when the defendants found securities of a permanent character vested in one of the trustees named in the will, as a trustee, they were charged with notice that these were securities which he held as trustee, and not as executor, and that he was committing a breach of trust in holding, in his separate name, securities belonging to a joint trust; and therefore that the plaintiffs, representing the estate, were entitled to have the mortgages transferred to them and to make the defendants account for the moneys paid thereon:—

Held, also, that the defaulting trustee had no power to pledge the assets of the estate, the onus was upon the defendants to shew that the proceeds were applied for the purposes of the estate:—

Held, also, that the grant of probate to the infant executor along with the adult was not a nullity :—

Held, lastly, that the recovery of judgment by the plaintiffs against the defaulting trustee for the amount advanced by him upon these mortgages did not bar the right of the action against the defendants.

Judgment of *Boyd, C.*, 19 O. R. 426, affirmed. *Cumming v. The Landed Banking and Loan Co.*, 382.

VENDOR AND PURCHASER.

1. *Conditions of sale—Taxes due up to time of sale.*]—A mortgagee, under two mortgages, sold the land under the power of sale in the second, and by his conditions of sale stipulated amongst other things that he was selling merely all his estate or interest under the second, subject to the first mortgage and interest ; that if a second mortgage was taken for part of the purchase money, it should be a first lien after the first mortgage and interest ; that if no objection was made within a certain time the vendor's title was to be held good and considered accepted by the purchaser, and the vendor entitled to the consideration ; and further that the said first mortgage could be paid off :—

Held, that taxes due up to the sale should be paid by the vendor. *Re Wilson and Houston*, 532.

VOLUNTARY CONVEYANCE.

1. *Action to set aside—Fraudulent intent—Defeating creditors.*]—Fraudulent intention is a material element in an action to set aside a conveyance as being voluntary and fraudulent against creditors, and where it does not exist the action cannot succeed.

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The fact that the result of a conveyance is to defeat creditors is not necessarily proof that the intention of the grantor in making it was fraudulent.

And where a debtor, under the mistaken belief that she was a trustee of a sum of money invested by her in land, in her own name, made a conveyance thereof to the supposed *cestuis que trustent*, honestly thinking she was carrying the trust into effect, an action to set aside the conveyance was dismissed, *Carr et al. v. Corfield et al.*, 218.

WATER RATES.

Discount to consumers—“Taxes.”]—See MUNICIPAL CORPORATIONS, 1.

WATER AND WATER-COURSES.

1. *Arbitration and award—Municipal corporations—Arbitration under sec. 590 of R. S. O. ch. 184—Constitution of board of arbitrators—“Interested” in sec. 389, meaning of.*]—A question arose under sec. 590 of the Municipal Act, R. S. O. ch. 184, between the townships of H. and R., whether H. caused waters to flow on R. to the detriment of R. which ought to be drained from R. at the expense of H. The township of T. also discharged waters over the other side of R., opposite H. :—

Held, that T. was not “interested” within the meaning of section 389 of the Act ; and therefore that a board of three arbitrators appointed, pursuant to that section, one by each of the three municipalities, was not properly constituted to determine the question ; and their award was set aside. *Re Townships of Harwich and Raleigh*, 154.

Navigable private waters—Game—Fishing and shooting rights—Waters artificially rendered navigable by public improvements.—See *GAME*, 1.

WILL.

1. *Devise—Misdescription of land.*—A testator owning lots 6 and 8 in the first concession devised the same in his will in two separate devises as “My property known as lot * * second concession,” etc.:—

Held, that his lots in the first concession passed. *Hickey v. Hickey et al.*, 371.

2. *Construction—Words of limitation in tail applied to personalty.*—A testator bequeathed personal estate to his wife, “to have and to hold unto her and the heirs of her body through her marriage with me, their, and each of their sole and only use forever”:—

Held, that the wife was entitled to the personalty absolutely, there being nothing to shew that the testator meant that the words, “heirs of her body, through her marriage with me,” should import anything different from their ordinary, natural meaning.

Crawford v. Trotter, 4 Madd. 361, distinguished. *Fuller v. Anderson*, 424.

3. *Property for payment of debts—Legacy—Children taking share of deceased parent.*—A testator by his will, after directing payments of his debts by his executors, gave his personal estate and the dwelling-house with the land occupied therewith, to his wife for life, and after her decease to his daughter M., and gave M. a legacy of \$2,000. He then devised the residue of his real estate to his executors in trust, to lease same and pay the interest to

his wife for life, and after her death, to sell same and divide the proceeds between his children, share and share alike. At the time of testator's death, the personal estate was of small value, and was exceeded by the amount of the debts; and it did not appear whether, when the will was made, the testator had sufficient personal estate of which the legacy could be paid:—

Held, that M. could not claim to have the \$2,000 paid out of the proceeds of the real estate devised to the executors, but that there should be no deduction from her share by reason of the real estate devised to her:—

Held, also that the children of a deceased child took the share of the proceeds of the real estate which their parent was entitled to. *Totten et al. v. Totten et al.*, 505.

Overpayment of interest on legacy—Recovery back—Interest on overpayments—Account.—See *MISTAKE*, 1.

WINDING-UP ACT.

Injunction to restrain proceedings in Montreal Court.—See *INJUNCTION*, 1.

WORDS.

“Interested.”—See *WATER AND WATER-COURSES*.

“Not less than seven years.”—See *CRIMINAL LAW*, 1.

“Obligation.”—See *BUILDING SOCIETY*.

“Taxes.”—See *MUNICIPAL CORPORATIONS*, 1.

WORKMEN'S COMPENSATION FOR INJURIES ACT.

See *MASTER AND SERVANT*, 1.

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